

1988

Staker Paving & Construction Company v. Foothill Thrift and Loan : Brief of Respondent

Utah Court of Appeals

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BRIEF

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DOCKET NO. 880463-CA IN THE COURT OF APPEALS

OF THE STATE OF UTAH

STAKER PAVING & CONSTRUCTION
COMPANY, INC.,

Plaintiff-Appellant,

v.

FOOTHILL THRIFT & LOAN CO.,

Defendant-Respondent.

Appellate No. 880463-CA

#146

BRIEF OF RESPONDENT
FOOTHILL THRIFT & LOAN CO.

Appeal from Judgment from Third Judicial District Court
for Salt Lake County, State of Utah,
Honorable Leonard H. Russon, District Judge

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FILED

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LIST OF ALL PARTIES

Plaintiff:

Staker Paving & Construction Company, Inc.,
a Utah corporation

Defendants:

Gerald H. Bagley, individually

Gerald H. Bagley dba West Jordan Properties

Gerald H. Bagley dba Bagley & Company

Foothill Thrift & Loan Co.

Magna-Garfield Employees Thrift Plan

Associated Title Company

Bagley Family Partnership

Claude Curley

Utah Power and Light Company

G.H. Bagley, Inc.

Elmer Jensen and Lois Jensen

Third-Party Plaintiff:

Claude Curley

Third-Party Defendant:

Tracy Mortgage Company

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JURISDICTION AND NATURE OF PROCEEDINGS BELOW

The Court of Appeals has jurisdiction over this matter pursuant to Rule 4A of the Rules of the Utah Supreme Court. Plaintiff-Appellant, Staker Paving and Construction Company, Inc. ("Staker") appeals a final Summary Judgment, Decree of Foreclosure and Order of Sale, issued by the Third Judicial District Court in favor of Defendant-Respondent, Foothill Thrift & Loan Co. ("Foothill"). The court directed entry of final judgment, pursuant to Rule 54(b) of the Utah Rules of Civil Procedure.

Notice of Appeal was made timely, and the Supreme Court, pursuant to Rule 4A(a) transferred the case to the Court of Appeals for disposition. Notice of the Order of Transfer was sent on July 29, 1988, Supreme Court Case No. 880200.

ISSUES PRESENTED FOR REVIEW

Appellant's statement of issues is unnecessarily duplicative. The determinative issues for this Court's review are as follows:

- I. DID THE TRIAL COURT CORRECTLY DETERMINE THAT THERE ARE NO GENUINE ISSUES OF MATERIAL FACT TO BE DECIDED BETWEEN STAKER AND FOOTHILL, CONCERNING SPECIFIC PERFORMANCE OF THE UNIFORM REAL ESTATE CONTRACT, AND THAT FOOTHILL IS ENTITLED TO JUDGMENT AS A MATTER OF LAW?
- II. AFTER REVIEWING THE FACTS AND INFERENCES REASONABLY DRAWN THEREFROM, IN THE LIGHT MOST FAVORABLE TO STAKER, IF A GENUINE ISSUE OF FACT NEEDS TO BE DECIDED, SHOULD STAKER BE ESTOPPED, AS A MATTER OF LAW, FROM URGING IT AGAINST FOOTHILL WHO WAS A BONA FIDE GOOD FAITH PURCHASER FOR VALUE WITHOUT NOTICE OF ANY CLAIM BY STAKER?

CONTROLLING PROVISIONS OF UTAH CONSTITUTION AND STATUTES

Rule 56, Utah Rules of Civil Procedure, is set forth in the attached Addendum. Pertinent provisions, concerning summary judgment, include the following:

56(c) ...The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....

56(e) Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits....

Utah Code Ann. Section 25-5-1 (1984) provides:

No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

Utah Code Ann. Section 25-5-3 (1984) provides:

Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be

void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

Utah Code Ann. Section 78-25-16 (1987), dealing with parol evidence of the contents of writings, is attached in its entirety in the Addendum. In pertinent part, it provides that "[t]here can be no evidence of the contents of a writing, other than the writing itself, except in the following cases....," none of which are similar to the present case.

STATEMENT OF THE CASE

This lawsuit involves a road construction contract between Bagley & Company (Owner) and Staker Paving & Construction Co., Inc. (Contractor), for work at the West Jordan Industrial Park. It also involves a Uniform Real Estate Contract under which Staker is the buyer and Foothill is the seller, covering land that is not part of the Industrial Park. Foothill obtained the seller's interest from West Jordan Properties, a limited partnership, of which Gerald H. Bagley ("Bagley") was a general partner. Copies of the contracts are included in the attached Addendum.

Staker commenced this lawsuit in November, 1985, seeking payment from Bagley, for work performed under the construction contract. In the alternative, Staker sought a warranty deed from Foothill, claiming accord and satisfaction of the real estate contract, by virtue of work performed under the construction contract.

Staker amended its Complaint to join defendants who own or claim an interest in the lands on which the construction work was performed. Against those defendants, Staker seeks to execute upon mechanic's liens filed for the work performed.

Foothill counterclaimed for specific performance of the uniform real estate contract, because Staker failed and refused to make the annual payment required thereunder. Staker claims the right to setoff, against the real estate contract, the value of construction work which was performed for Bagley & Company but not for Foothill or its predecessor, West Jordan Properties. The work was not performed on the contract lands, and was not performed at Foothill's request, or for its benefit.

Foothill moved for summary judgment against Staker. Following a hearing conducted on November 9, 1987, the lower court issued its Order, dated December 11, 1987, granting partial summary judgment to Foothill. The court determined that the Uniform Real Estate Contract is clear and unambiguous, and that there is no evidence that Bagley and Staker intended to modify the real estate contract.

Staker objected to the form of the Order, and a hearing was held on December 14, 1987. At the hearing, the court and counsel agreed to modify paragraph No. 2 of the Order, to state that no parol evidence would be allowed at trial, to modify the contract. See Order dated December 16, 1987.

The court further determined that the contract was not modified by the parties' course of dealing, and that there is no

issue of fact, as to Foothill's right to enforce the contract as written. The sole issue remaining for trial, as between these parties, was to determine the balance owed under the contract as of the date when Foothill notified Staker of the assignment. A copy of the Court's Orders are included in the attached Addendum.

Following additional discovery, Foothill brought a second motion for summary judgment. The motion was heard on April 11, 1988, and granted in favor of Foothill. Summary Judgment, Decree of Foreclosure, and Order of Sale was made final, and entered on May 3, 1988. A copy of said Judgment, Decree and Order is included in the attached Addendum.

This appeal is limited to a determination of the lawsuit as between Foothill and Staker.

STATEMENT OF FACTS

In connection with the motions for summary judgment, Foothill moved to publish the following depositions. R.281-282.

Gerald H. Bagley (12-19-86)
Thomas G. Bagley (6-10-87)
Richard L. Sorensen (6-10-87) [Controller of Bagley
entities]
Larry E. Grant (6-29-87) [Foothill Vice President]

The depositions were extensively briefed and argued to the lower court by both parties. Only the deposition of Larry Grant was numbered in the Record. Therefore, pages referenced to the remaining depositions are included in the attached Addendum.

On July 1, 1977, West Jordan Properties, a Bagley limited partnership (Seller), entered into a Uniform Real Estate Contract with Staker Paving & Construction Co., Inc. (Buyer).

The contract required annual payments of \$54,572.06, together with interest, on July 1 of each year until the balance was fully paid. Paragraph 20 of the contract purports to make the agreement an integration of all representations, covenants, or agreements between the parties. R.19-20.

While the contract was in force, Gerald H. Bagley and/or Bagley-owned entities, contracted with Staker for road and pavement work on lands not covered by the real estate contract. Sorensen pp.21-22, 79-81. During this period of time (1977-1985), the Bagley entities paid millions of dollars to Staker, for construction work. G.H.Bagley p.20; Sorensen p.84.

From time to time--but not every time--when a Bagley entity owed Staker for work, or when Staker owed West Jordan Properties a payment under the real estate contract, one of the parties would request that a trade payment be credited as a setoff against the balance owed under the real estate contract. Sorensen pp.13-14, 16-29, 51; G.H.Bagley pp. 19-20. Trade payments were simply a shortcut to each party's respective obligation to pay cash to the other. Sorensen p.60.

None of the work, performed by Staker, was done for the seller under the real estate contract, nor was it performed on the contract lands. Sorensen pp.78-79, 82.

Decisions to allow either party to setoff a trade payment, in lieu of a cash payment, were orally agreed to by the parties, on a case-by-case basis, and were only documented by adjustments in accounting records. Sorensen pp.15, 22-24.

Four of the ten setoffs, which the parties agreed upon, were the subject of written requests for trade, made by Staker in 1980. Sorensen Ex. 11. In the letters, Staker asked to be informed if the requested setoff was not agreeable to Bagley.

Id.

Trade payments were allowed only when both parties deemed it to be mutually beneficial and only when mutually agreeable. Sorensen pp.10-11, 64-66, 88. Sorensen testified:

There was no option that one party could impose on the other. The option was that it could be discussed because the trades were never agreed upon unless they were agreed upon by both parties. Sorensen pp. 81-82.

On several occasions, trade payments were unacceptable to one or both parties and, therefore, were disallowed. Sorensen pp.22, 88. Both parties had occasions to disallow a trade payment or setoff against the real estate contract, when requested by the other party. Sorensen pp.83-84, pp.21-22, 88; T.Bagley p.13. Some trade payments were agreed to in advance, and some were agreed to after the work had been performed. Sorensen pp. 83-84.

Neither party had any right to insist that the other accept a trade payment. Sorensen p.81-82; T.Bagley p.37. On at least one occasion, Bagley was subjected to a financial hardship, because Staker refused to allow Bagley a trade payment against the real estate contract, and insisted upon cash payment for construction work. Sorensen p.22.

During the life of the real estate contract, Staker paid \$215,467.83 in cash, and was allowed to setoff trade payments totaling \$256,774.23. Sorensen Ex.8; same R.478. During the same period of time, Bagley paid millions of dollars to Staker, for construction work. Sorensen p.84; G.H.Bagley p. 20. The amount paid to Staker, for construction work, was far in excess of the balance Staker owed under the contract. Sorensen p.62.

On June 13, 1983, Staker entered into a road construction contract with Bagley & Company. The work was to be performed on lands other than the property covered by the real estate contract with West Jordan Properties. Sorensen pp.80-81; R.389-394. The construction contract called for money payments to be made for the work. No reference was made to trade payments or to the 1977 real estate contract. The bid and road construction contract were prepared by Staker. R.389-394.

In connection with the road construction contract, Staker was paid an advance against work to be performed, in the amount of \$50,490.73. R.514. However, work was not commenced until the following year in October, 1984. R.352 Work was suspended on November 15, 1984, and was never completed. Id. The work was determined to be unacceptable to the City of West Jordan and, therefore, unacceptable to Bagley. G.H.Bagley pp.30, 39-41, 48-49; Sorensen pp.89-90. Bagley never agreed to a setoff for the work. G.H.Bagley p.44.

During 1984, Bagley had several loans with Foothill, which became delinquent. In early 1985, Foothill and Bagley voluntarily agreed to a transaction, whereby Bagley could obtain capital by deeding several parcels of real property to Foothill, and by assigning the seller's interest in five or six Uniform Real Estate Contracts. One of the deeds and assignments covered the land and contract, wherein Staker is the purchaser, and which is the subject of this appeal. Grant pp.9, 14; Sorensen pp.55-59. Copies of the deed and assignment are in the attached Addendum.

Preparatory to the deed and assignment, Foothill reviewed the real estate contract and obtained Bagley's assurance that it was in good standing. Grant pp.18-21; Sorensen pp.61, 63-64, 91-92; G.H.Bagley pp.44, 74-75. As additional conditions precedent to the assignment, Foothill obtained a title report and requested a verification of the balance, owed under the contract, to be provided by Staker. R.343; Grant pp. 18-21; Sorensen pp.61, 63-64, 91-92.

The title report, covering the real estate contract lands, did not reveal any adverse claim by Staker. Grant Ex. 19. Sorensen obtained a verification letter from Staker, dated February 14, 1985, confirming that the balance owed under the real estate contract was \$98,471.84. R.491.

The confirmation letter was provided by Staker's accountant, Terry White, with whom Sorensen normally dealt. Sorensen pp.46-49. Sorensen informed Mr. White that the purpose

for obtaining the confirmation letter was preparatory to making an assignment of the real estate contract to Foothill. Sorensen pp.48-51, 55. No request for a trade payment was made to Sorensen, Bagley, or Foothill, at this time. R.343, 353; Grant p.29; Sorensen p.34.

The balance owed under the contract was also evidenced by an accounting ledger, prepared by Richard Sorensen, Controller for the Bagley entities. Sorensen p.15, Ex. 8. Sorensen adjusted the records of West Jordan Properties, to agree with Staker's records, concerning the outstanding balance. Sorensen pp. 82-83. The ledger sets forth the payment history of the real estate contract, including trade payments allowed. R.301. It was provided to Foothill in connection with the assignment. Sorensen p.31.

The real estate contract was assigned to Foothill, on March 12, 1985, with Bagley's representation and assurance that the balance was \$98,471.84, and that the contract was in good standing. G.H.Bagley pp.74-75; Sorensen pp.61, 91-92; Grant pp.27-28; Assignment.

When the contract was assigned, no construction work had been done by Staker that was entitled to be setoff against the contract. Sorensen pp.91-92; G.H.Bagley p.44. Furthermore, no setoffs were agreed to, or allowed, after the assignment to Foothill. Sorensen p.87; G.H.Bagley p.44.

In reliance on the contract terms, the title report, the confirmation letter from Staker, and the representations of Bagley, Foothill paid approximately \$100,000 for the property, and for the assignment of the seller's interest in the real estate contract. R.343; Grant pp.14-15. The only purpose for Foothill's payment of valuable consideration was the expectation that the purchaser, Staker, would make the remaining payments, as required by the contract. R.343; G.H.Bagley pp.74-75.

Bagley elected to apply the money, paid by Foothill, to reduce his delinquent debts with Foothill. G.H.Bagley p.44; Grant p.14.

On March 21, 1985, Foothill recorded the quit claim deed and the assignment of real estate contract. R.302-304. On March 22, 1985, Foothill notified Staker in writing, that the real estate contract had been assigned, and that all future payments should be made directly to Foothill. The notice set forth the contract balance of \$98,471.84, with interest paid to July 9, 1984, and invited any questions by Staker. R.305; Grant p.25. Staker remained silent and did not claim any setoff from Foothill. R.343, 344, 353.

Prior to receiving the quit claim deed and assignment of real estate contract, Foothill may have determined from the ledger sheet, or Sorensen may have told Larry Grant, that Bagley and Staker had occasion to allow trade payments to be setoff against the contract balance. However, Sorensen never connected the real estate contract with any right to demand a trade

payment. Sorensen p.51. Furthermore, Bagley testified that he would not have discussed trade payments, with Foothill, when negotiating the sale and assignment; "it wouldn't have been any of [their] business." G.H.Bagley p.28. Bagley specifically told Foothill that there were no outstanding trade payments. Sorensen p.61; G.H.Bagley pp.44, 46, 74-75.

Foothill had no knowledge, actual or constructive, concerning the 1983 construction contract, or the road work performed thereunder, on lands not covered by the real estate contract. R.343; Grant p.29. Furthermore, Foothill had no knowledge of any claim, or agreement, that would entitle Staker to a trade payment. R.343; Grant pp.23, 28; Sorensen p.61; G.H. Bagley pp.44, 74-75.

In February, 1985, Staker received a \$14,000 payment from Tracy Mortgage, and were told that there were no additional construction loan monies available for the work. R.352. Despite this information, Staker still did not request a trade payment of Bagley, or from Foothill.

On February 14, 1985, Staker recorded a Notice of Lien for work performed under the 1983 road construction contract. The lands affected by the lien are not covered by the real estate contract, and no reference was made to the contract. R.21-22.

Foothill does not claim an ownership interest in the lands on which the construction work was performed; they are owned by other defendants in this lawsuit. See Foothill's Answer and Counterclaim. The lien is for construction work, and is for

the same money that Staker claims as a setoff against the real estate contract. See Staker's Amended Complaint.

According to Staker's brief, the work was performed during September through November (1984) totaling \$125,000, of which only \$14,000 was paid. However, Staker's own evidence shows that all of the work was performed between October 10, 1984, and November 15, 1984, and that they received an advance payment of \$50,490.73, in addition to the \$14,000 payment. R.352, 476; Staker's response to Interrogatories of Tracy Mortgage Company, Response No. 7, dated February 16, 1988.

Staker first contacted Foothill by phone, on May 15, 1985, after receiving notice that the assignment had been consummated. Staker asked if they would be allowed to setoff a trade payment, against the real estate contract, for the construction work performed for Bagley, on other lands. Foothill refused. R.353; Grant p.41, Ex. 22. A second request was made on or about July 26, 1985, in a call made by Mark White of Staker, to Larry Grant of Foothill. R.353, 375. By that time, Staker was in default under the real estate contract, for failing to make the annual payment, due July 1, 1985.

When Foothill again refused to allow a setoff, Mr. White wrote to Staker's attorney and told him that Staker would not be allowed to make a trade payment on the contract. The letter went on to state that it was then Staker's main concern, to assure that they could obtain clear title to the property, upon paying the contract balance. Furthermore, that it was

Staker's desire to maintain the payment schedule set forth in the contract, unless an accelerated payment was required. R.306.

Staker failed and refused to pay the contract payment to Foothill. R.344.

On August 13, 1985, five months following the deed and assignment to Foothill, Staker wrote to Bagley and said, "This letter is to inform you that we have elected to offset monies owed us by Mr. Bagley against all monies owed on the referenced [real estate] contract." R.387-388. Staker had known for months that Bagley had deeded the property and assigned the contract to Foothill. Bagley did not think he had any right to allow a setoff to Foothill's interest, and he did not agree to a trade. G.H.Bagley pp.44, 46, 74-75; Sorensen pp.74,87.

In addition, the construction work performed by Staker had not been approved by the City of West Jordan; nor had Bagley accepted the work for payment under the road construction contract. G.H.Bagley pp.30-31, 39-41; T.Bagley pp.32-33; Sorensen pp.89-90.

Foothill sent a formal Notice of Default to Staker, which was duly recorded. Grant Ex.20. Whereupon, Staker initiated this lawsuit in November, 1985.

SUMMARY OF ARGUMENTS

I

The lower court correctly granted summary judgment in favor of Foothill, against Staker, because there is no credible evidence that a genuine issue of material fact remains to be

decided between them, and Foothill is entitled to judgment as a matter of law.

The Court determined that the subject real estate contract is clear and unambiguous. Furthermore, the Court determined that there is no evidence that the contract was modified, or that Staker and Bagley intended to modify the contract, prior to Foothill's purchase.

The Court streamlined the remaining issue for trial between Staker and Foothill and, in so doing, determined that no parol evidence would be allowed at trial to modify the contract.

The court's ruling is in harmony with the statutes of fraud, which require real property contracts to be in writing, or they are unenforceable. In addition, the parol evidence rule precludes parol evidence of the contents of a writing.

The Appellate Court is not bound by the lower court's determinations of questions of law. It should apply the same analytical approach in reviewing the facts, and reasonable inferences to be drawn therefrom, in the light most favorable to Staker.

There is no credible evidence that raises a genuine issue of material fact between Staker and Foothill. Staker incorrectly urges application of the "doctrine of practical construction", in support of its claim that the course of dealing between Bagley and Staker, rendered the real estate contract ambiguous, and constituted a modification. This argument is untenable. First, the doctrine is inapplicable because the real

estate contract is clear and unambiguous. Second, the conduct of the parties does not demonstrate that the contract is ambiguous. Third, there is no evidence that Bagley and Staker had the requisite intent to modify the contract. Fourth, the evidence fails to raise a genuine issue of material fact between Foothill and Staker.

The course of dealing between Staker and Bagley, whereby they allowed intermittent trade payments to be setoff against the real estate contract, does not demonstrate the requisite intent to modify the real estate contract. The parties never discussed, or agreed, to modify the contract's payment provision as to future performance. Trade payments were merely a shortcut to each parties' respective obligation to make a cash payment to the other. Either party could request a trade payment be applied, but neither party could insist that the other accept the setoff.

The only affidavits submitted by Staker, in opposition to Foothill's motions for summary judgment, are the Affidavit and Supplemental Affidavit of William Fillmore. Foothill moved to strike those affidavits on the grounds that Mr. Fillmore was incompetent to testify to the matters stated therein, and that the affidavits were otherwise insufficient. The lower court did not expressly rule on Foothill's motions to strike, and Foothill reasserts its objections on the grounds stated in its motions of record.

Even if the testimony of Mr. Fillmore is considered to be credible evidence, it does not demonstrate that there exists an issue of material fact which would preclude Foothill from summary judgment for specific performance of the real estate contract.

Foothill purchased the land and was assigned the seller's interest in the real estate contract for valuable consideration. At the time of the assignment, Foothill had no knowledge, actual or constructive, that Bagley and Staker had entered into the 1983 road construction contract for work on different lands. Even if Foothill had known about the construction work performed by Staker, a setoff would still be inappropriate, because there was no mutual agreement to allow the work to be a setoff against the real estate contract. Moreover, Staker did not claim a setoff, until after they received notice of the assignment to Foothill.

If there is an issue of fact, concerning modification of the real estate contract, it is a dispute between Bagley and Staker. It does not create a genuine issue of material fact between Foothill and Staker. Bagley is not a party to this appeal.

II.

Although this court's affirmance of the first issue, would be dispositive of this matter, should the Court find that there is a genuine issue of material fact to be decided between Foothill and Staker, concerning Staker's claim for a contract

setoff, the Court should determine, as a matter of law, that Staker has precluded itself from urging the claim against Foothill.

As conditions precedent to purchasing the real property, and receiving assignment of the real estate contract, Foothill obtained a title report covering the land. There are no adverse claims by Staker, filed of record as to these lands.

In addition, Foothill required a confirmation letter of the contract balance, to be provided by Staker. Staker provided the confirmation letter on February 14, 1985, prior to the assignment.

As further precautions, Foothill reviewed the terms of the real estate contract, and obtained Bagley's assurance that the contract was in good standing and that future payments could be expected in accordance with the contract terms and conditions.

Prior to the transaction, Foothill had no knowledge, whatsoever, that Staker had performed work on other lands, which it would later claim as a setoff to the real estate contract.

On March 21, 1985, Foothill recorded the Quit Claim Deed and the Assignment of Real Estate Contract. On March 22, 1985, Foothill sent proper notice to Staker, informing them to send future payments directly to Foothill, and inviting any questions Staker might have had. Staker first contacted Foothill on May 15, 1985, and asked to be allowed a setoff for the construction work which was performed for Bagley on different lands.

As a bona fide, good faith purchaser for value, without notice of the claimed setoff, Foothill should not be subject to Staker's claim. The construction work was totally unrelated to the real estate contract. Furthermore, Staker's claim for payment had not yet matured because of a dispute with Bagley over negligent performance.

Bagley testified that he had not agreed to modify the contract and that he had not agreed to Staker's claimed setoff. Staker's own conduct demonstrates that they did not intend to modify the contract. They never sought a written modification of the real estate contract; they failed to reference the real estate contract when preparing the construction contract; they failed to speak up after being notified that Bagley intended to assign the contract to Foothill; and they failed to claim a setoff until months after the assignment was consummated. Staker subsequently expressed a desire to maintain the payment schedule set forth in the contract.

Prior to the assignment, Staker was advised that a construction loan for the work had been depleted. Despite this information, and their belief that Bagley was cash poor, Staker still did not seek a setoff for their work. Instead, they chose to let the contract interest accrue on the balance they owed. This, they claim, was because the next payment was not due until July. However, the majority of trade payments were not made in June or July. It was contrary to their best interest to not

immediately seek a setoff--if they genuinely believed they were entitled.

The real estate contract was freely assignable, and neither Bagley nor Foothill had any duty to obtain Staker's permission prior to the assignment. When Staker received notice of the assignment, they became obligated to make payments to Foothill.

ARGUMENT

I

Appellant-Staker has mischaracterized the testimony of deponents, and otherwise misconstrued the evidence, attempting to give the appearance that there are issues of fact as between Staker and Foothill. However, there is no credible evidence that raises a genuine issue of material fact that needs to be decided between them, and Foothill is entitled to judgment as a matter of law.

Staker contends that the lower court refused to accept parol evidence concerning the course of dealing between Bagley and Staker, prior to the real estate contract being assigned to Foothill. This is not true. Depositions, interrogatories, contracts, correspondence, accounting records, and affidavits were presented for consideration. The parties' course of dealing is undisputed, and was extensively documented and submitted to the court in the hearings for summary judgment. The court did not "weigh" the evidence, as that would be improper in resolving a motion for summary judgment. What the court did was to

determine that the evidence failed to raise a genuine issue of material fact, between Staker and Foothill.

In streamlining the dispute between Staker and Foothill, the lower court granted partial summary judgment to Foothill and determined, as a matter of law, that parol evidence would not be allowed at trial, to alter or modify the express terms of the Uniform Real Estate Contract. R.413-416; 418-421. After additional discovery, the remaining issue was similarly determined to be undisputed. R.553-558.

This Court is not bound by the lower court's determinations of questions of law. In a recent pronouncement of its standard for review of a summary judgment, Lucky Seven Radio Corp. v. Clark, 755 P.2d 750 (Utah App. 1988) at 752, this court stated that its duty is to apply the analytical standard required of the trial court, and to liberally construe the facts and view the evidence in a light most favorable to the party opposing the motion for summary judgment. Furthermore, if there is a dispute as to a material issue of fact, the summary judgment should be reversed and the matter remanded for a trial on that issue. Id. However, in the present case, there is no credible evidence, which raises a genuine issue of material fact to be decided, concerning Foothill's right to enforce the real estate contract as written.

The primary purpose of summary judgment, is to pierce the allegations of the pleadings, and show that there is no genuine issue of material fact, and that the moving party was

entitled to judgment as a matter of law. Dupler v. Yates, 351 P.2d 624, 636 (Utah 1960).

"Summary judgment is appropriate whenever the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Utah R.Civ.P. 56(c)." Briggs v. Holcomb, 740 P.2d 281 (Utah App. 1987) at 283.

Staker appeals the lower court's determination that parol evidence would be inadmissible to alter the real estate contract. This ruling is in accord with Utah's statutes of fraud, Utah Code Ann. Section 25-5-1, and Section 25-5-3 (1984), which require real property agreements to be in writing, or they are unenforceable.

Furthermore, the ruling was in accord with Utah's parol evidence rule, Utah Ann. Section 78-25-16 (1987), which precludes parol evidence of the contents of a writing.

The intended purpose of such statutes, has been stated to be as follows:

The provisions of the statute of frauds applicable to contracts affecting interests in land were adopted for the purpose of preventing existing estates in land from being upset by parol evidence, and to preserve the title to real property from the chances, the uncertainty, and the fraud, attending the admission of parol testimony.

72 Am. Jur. 2d, Statute of Frauds, Sec. 44.

The only documentary evidence, advanced and claimed by Staker to demonstrate the alleged contract modification, are four letters sent by Staker to Bagley in 1980. In those letters, Staker asked to allowed setoffs, for certain trade payments, and to be informed if the setoffs were unacceptable. R.477, 478, 483, 485-487. All of the trade payments were documented by accounting ledgers prepared by Bagley and Staker. These documents fall short of memorializing an agreement to modify future performance under the real estate contract.

Staker also contends that the real estate contract was rendered ambiguous and modified, by the parties allowing trade payments. They present, as legal authority, language of the Utah Supreme Court in the case of P.L.C. Landscape Const. v. Piccadilly Fish 'N Chips, Inc., 502 P.2d 562 (Utah 1972). However, a very relevant portion of the quotation was omitted from Appellant's brief, and is underlined below:

Except where a change, modification or addition to a contract may conflict with the well-recognized rule against varying a written contract by parol, there is nothing so sacrosanct about having entered into one agreement that it will prevent the parties entering into any such change, modification, extension or addition to their arrangement for doing business with each other that they may mutually agree. 502 P.2d at 563 (emphasis added).

It would be improper to allow parol evidence to modify the real estate contract. There is no evidence that Staker and Bagley mutually intended to modify the real estate contract.

Moreover, the evidence does not even raise a genuine issue of fact, concerning this matter.

This Court recently considered whether or not parol evidence should be allowed to modify a broker's commission agreement in connection with the sale of real property. C. J. Realty, Inc. v. Willey, 86 Utah Adv. Rep. 33 (Utah App. 1988) The Court determined that, when a contract is ambiguous, parol evidence should be allowed, and factual findings made for the purpose of determining the intent of the parties. The Court explained that:

A contract is considered ambiguous if "the words used to express the meaning and intention of the parties are insufficient in a sense that the contract may be understood to reach two or more plausible meanings."
(Cite omit.)

C.J. Realty, Inc. v. Willey, 86 Utah Adv. Rep. 33 (Utah App. 1988) at 36.

Furthermore, in the case of Metro. Prop. & Liability v. Finlayson, 751 P.2d 254 (Utah App. 1988) at page 257, the Court observed that:

Language is considered ambiguous if "the words used to express the meaning and intention of the parties are insufficient in a sense that the contract may be understood to reach two or more plausible meanings."
(Cite omit.)

In the present case, neither the Uniform Real Estate Contract nor the road construction contract, considered separately or together, contain language or terms that are ambiguous.

Staker next contends that, although the real estate contract is unambiguous as written, it was rendered ambiguous and modified by the course of dealing between Bagley and Staker. They rely on application of the "doctrine of practical construction" to show that the parties course of dealing, modified the contract. This reliance is misplaced.

It would be inappropriate to apply the doctrine in the case before this Court. "The doctrine of practical construction can only be applied when the contract is ambiguous, and cannot be used when the contract is unambiguous." Bullough v. Simms, 400 P.2d 20, 23 (Utah 1965); Bullfrog Marina, Inc. v. Lentz, 501 P.2d 266, 271 (Utah 1972). Furthermore, the existence, and the resolution, of contract ambiguities, are questions of law for the court. Morris v. Mountain States Telephone and Telegraph Co., 658 P.2d 1199 (Utah 1983) at p. 1200.

The "doctrine of practical construction" is based upon the common sense concept that "actions speak louder than words." In the present case, there was no conduct by the parties which indicated they intended to modify the payment provision of the real estate contract. All of the evidence is to the contrary.

Bagley's testimony clearly demonstrates that he did not contemplate, or intend, to modify the contract. G.H.Bagley pp.22-23, 44.

Staker's own conduct demonstrates that they did not intend to modify the contract as to future performance. They did not seek to modify the contract in writing. They did not include

any reference to the contract when they prepared the bid and construction contract.

Trade payments were allowed only on a case-by-case basis, and only when mutually beneficial and agreed to by Bagley and Staker. Both parties had occasion to deny the other a right to setoff a trade payment against the real estate contract. On at least one occasion, Staker requested that only a portion of the money they were owed for construction work, be applied to the real estate contract, the balance to be paid in cash. Sorensen Ex. 11.

Staker did not attempt to accelerate payment of the contract balance, as allowed by the contract terms, even after learning that the applicable construction loan, had been exhausted. R.352-353. If the payment provision of the contract had been modified, as claimed by Staker, the remaining balance could have been satisfied many times over, by their demanding trade payments for construction work.

Staker did not approach Foothill, to request a setoff, until after receiving notice of the assignment to Foothill. In fact, Staker did not notify Bagley of Staker's intention to setoff a trade payment, until August 13, 1985, five months following the assignment. R.387-388. At that time, Bagley and Staker were still in disagreement as to whether or not the work had been performed by Staker in accordance with the construction contract. G.H.Bagley pp. 30-31, 39-41; Sorensen pp. 89-90; T.Bagley pp. 32-33.

The Utah Supreme Court has consistently recognized that one of the essential incidents of a contract is mutuality of agreement or mutuality of obligation. With respect to contract modifications, the Court has said:

It is true the parties to a written contract may modify, waive, or make new contractual terms, even if the contract itself contains a provision to the contrary. (Cite omit.) However, the minds of the parties must have met upon an asserted contract modification. (Cite omit.)

Provo City Corp. v. Nielson Scott Co., 603 P.2d 803, 806 (Utah 1979).

Despite counsel's argument to the contrary, there is no evidence that Staker and Bagley had a meeting of the minds, concerning a modification of the real estate contract, as to future performance. More important, for purposes of this appeal, there is no evidence that raises an issue of fact between Staker and Foothill.

In defense to Foothill's request for specific performance of the real estate contract, Staker claimed accord and satisfaction, by virtue of its construction work. However, there is no credible evidence that Bagley and Staker had even discussed, much less reached agreement, to an accord and satisfaction.

In the case of Spor v. Crested Butte Silver Min., Inc., 740 P.2d 1304 (Utah 1987), the Court said:

[B]efore an accord and satisfaction can arise, there must be an offer and acceptance and a meeting of the minds. (Cite omit).

An accord and satisfaction arises when the parties to a contract mutually agree that a different performance than that required by the original contract will be in substitution of the performance originally agreed upon and that the substituted agreement calling for the different performance will discharge the obligation created under the original agreement (Cite omit) 740 P.2d 1308.

The only affidavits submitted by Staker, in opposition to Foothills' motions for summary judgment, are the Affidavit, and Supplemental Affidavit, of William Fillmore. R.350-359, 496-515. Foothill objected to the introduction of such affidavits and moved to have them stricken. R.357-394, 527-533. The lower court did not expressly rule on Foothill's motions to strike the affidavits, and Foothill reasserts its objections to the affidavits, on the grounds set forth in its memorandums of record. Id.

The affidavits are insufficient under Rule 56(e), Utah Rules of Civil Procedure, which requires affidavits to be based on personal knowledge, and to set forth such facts as would be admissible in evidence. This Court has aptly observed as follows:

Utah R. Civ. P. 56(e) provides that affidavits in opposition to a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. (Cite omit.)

Bruno v. Plateau Min. Co., 747 P.2d 1055 (Utah App. 1987) at 1056. In that case, the Court affirmed summary judgment for an

employer, against an employee's claim that a course of dealing had modified an employment-at-will relationship. The Court said:

An implied contract altering the employment employment-at-will relationship, like other contracts implied-in-fact, would require actions or conduct manifesting the mutual assent of both parties to be bound by the certain terms of their bargain. See Fowler v. Taylor, 554 P.2d 205, 208 (Utah 1976). 747 P.2d at 1058.

The Utah Supreme Court has stated that an Affidavit must be based on the affiant's personal knowledge, and that an affidavit based merely on his unsubstantiated opinions and beliefs is insufficient. Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985).

Hearsay testimony and opinion testimony that would not be admissible if testified at the trial may not properly be set forth in an affidavit supporting a summary judgment. Walker v. Rocky Mt. Recreation Corp., 508 P.2d 538 (Utah 1973).

Furthermore, statements in an affidavit which are largely conclusory in form may not be considered on summary judgment under subdivision (e) of Rule 56. Norton v. Blackham, 669 P.2d 857 (Utah 1983). An affidavit which merely reflects the affiant's unsubstantiated conclusions, and which fails to state evidentiary facts, is insufficient to create an issue of fact. Williams v. Melby, 699 P.2d 723 (Utah 1985).

Mr. Fillmore's testimony is not based on personal knowledge; he lacks personal knowledge of the facts to which he testified; his testimony is contrary to prior admissions by

Staker; and his affidavits are otherwise inadmissible insofar as they contain hearsay and opinion testimony, and are primarily conclusory in form. Moreover, his testimony is unsubstantiated and contradicted by the evidence.

Mr. Fillmore testifies concerning discussions and transactions to which he was not a party; some of which, he states, took place more than two years before his employment by Staker. R.351, 499.

Mr. Fillmore testifies that trade payments were not made on projects, such as the Jeremy Ranch, when Bagley had arranged financing for the work. R. 351. He also states that Staker performed the construction work at the West Jordan Industrial Park, only with Bagley's assurance that it could be setoff as a trade payment. R. 352.

This testimony is directly contradicted by the evidence. At least two of the trade payments were for work at the Jeremy Ranch. Sorensen Exs.8, 11. Furthermore, Fillmore contradicts himself by admitting that there was construction financing for the work at the Industrial Park, at the time when he claims Bagley assured them that a setoff would be allowed. R.352, 500.

Foothill believes, that even if the Affidavit and Supplemental Affidavit of William Fillmore are considered by this Court, as credible evidence, the testimony therein fails to demonstrate that there exists a genuine issue of material fact to defeat Foothill's summary judgment. For example, he admits that

Foothill was not contacted by Staker, and asked to allow a setoff, until after Staker received notice of the assignment. R.353, 501.

When Staker was notified in February, 1985, that there was only \$14,000 remaining for construction financing, Fillmore states that Staker elected to not claim a setoff until the July 1, 1985, payment came due. R. 352. This is further evidence that Staker's claimed setoff had not matured prior to the real estate contract being assigned to Foothill. It is curious that Staker chose to suffer accruing interest, despite Bagley's alleged assurance that they would be allowed a setoff. The majority of the trade payments were not done on or about July 1 of the calendar year. R.512. Bagley directly refutes that there was an agreement to allow the setoff. G.H.Bagley p.28; Sorensen p.61.

II

Although Foothill believes that the course of dealing, between Staker and Bagley, lacked the requisite intent to modify the real estate contract, if there is an issue of fact, it is between Staker and Bagley. In addition, Staker has precluded itself from urging such fact against Foothill who is a bona fide, good faith purchaser of the land and real estate contract.

Staker contends that the assignment from West Jordan Properties, placed Foothill in the "same shoes" as Bagley & Co., a stranger to the real estate contract. This argument is untenable.

The general rule "that an assignee can acquire no rights superior to those held by his assignor is not without exceptions." 6 Am. Jur. 2d Assignments, Section 103; 3 Williston, Contracts 3d ed. Section 432.

Some of the exceptions to the general rule arose from fact situations that were similar to the facts now before this court. For example, courts have disallowed setoffs when the claim was unrelated to the assigned contract, or when the claim had not matured at the time of the assignment.

Furthermore, the general rule that "the assignee takes an assignment subject to all equities and defenses then existing against the instrument assigned,...is subject to the qualification that the debtor has not by his conduct waived, or estopped himself to assert, any counterdemands he may have had against the assignor." 51 ALR 2d 886, at 889. The courts have frequently estopped a debtor from claiming setoffs against an assignee when the debtor's acts of omission or commission were similar to those of Staker in this case. Id.

For example, if a debtor is entitled to claim a setoff, he is under a duty to "speak up" when notified of an assignment. When he remains silent, he is estopped from subsequently raising the claim. In the present case, Staker failed to contact Foothill, when Sorensen notified Staker of the pending assignment, but waited until months thereafter. R.353, 501; Sorensen pp.48-51, 55.

Debtors have also been estopped from advancing claims which are contrary to their prior representations. In the present case, Staker confirmed the balance owed under the real estate contract, after performing the road construction work, and prior to the assignment. R.301. Months after the assignment was consummated, Staker indicated that it desired to maintain the payment schedule set forth in the contract. R.306.

Debtors have also been estopped from asserting setoffs against an assignee, that did not exist, or mature, prior to the assignment. In the present case, Bagley and Staker had never reached agreement on whether or not the construction work had been satisfactorily performed by Staker, in accordance with the construction contract. G.H.Bagley pp.30, 39-40.

Staker did not request to be allowed a credit for a trade payment until months after being notified of the assignment. R.353, 501. Even if Staker was entitled to claim a setoff against Bagley, they should now be estopped, as a matter of law, from advancing the claim against Foothill.

The statutory authority cited in Staker's brief, in support of its right to claim a setoff against Foothill, is inapplicable. U.C.A. 70A-9-318 (1953) advanced by Staker, discusses certain defenses that an account debtor may setoff against an assignee following an assignment of a secured transaction. However, Utah Code Ann. Section 70A-9-104 (1980) makes Chapter 9 of Utah's Uniform Commercial Code inapplicable to the type of assignment, which is the subject of this lawsuit,

and to factual situations similar to the undisputed facts of this case. U.C.A. Section 70A-9-318 does not apply: to transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract; or to any right of setoff; or to the creation or transfer of an interest in or lien on real estate. Utah Code Ann. Section 70A-9-104 (f), (i), and (j) (1980).

The concept that an assignee stands in the same shoes of his assignor developed in commercial transactions. In cases involving the assignment of real property, when the courts have had occasion to apply the general rule, the issue consistently focused on the quality and extent of the property title which the assignor was capable of assigning. See for example, Wiscombe v. Lockhart Co., 608 P.2d 236 (Utah 1980). In the present case, there is no dispute over the quality or extent of Bagley's title to the real estate, conveyed to Foothill.

Staker should not be allowed to claim a setoff against Foothill, for construction work performed on lands not covered by the real estate contract. Similarly, Foothill would not be entitled to claim a setoff against Staker for the allegedly negligent work, performed on different lands, for the benefit of Bagley and other land owners.

Staker claims that Foothill knew, or should have known, that Bagley had occasion to allow trade payments. However, whether or not Foothill knew that Staker and Bagley had intermittently allowed trade payments, is immaterial. The

significant facts are undisputed. Foothill had no notice, actual or constructive, of the 1983 road construction contract, and the work performed thereunder. Foothill gave valuable consideration in reliance on: the title report; the terms and conditions of the real estate contract; the confirmation letter from Staker; the accounting ledger; the representations and assurances of Bagley; and the silence of Staker, concerning setoffs. R.343.

Foothill was a bona fide purchaser for value of the real property, without notice of any defects or claim by Staker.

It has been declared that the soundest reasons of justice and policy demand that every reasonable intendment should be made to support the titles of bona fide purchasers of real property, and that no equity can be any stronger than that of a purchaser who has put himself in peril by purchasing a title for a valuable consideration without notice of any defect in it.

77 Am. Jur. 2d, Vendor and Purchaser, Section 633.

With respect to an obligor's duty to honor an assignment by an obligee, the Utah Supreme Court has said:

When an obligee has acquired the right to receive money, it is his prerogative to assign it to whomever he selects; it is not essential that the debtor agree to the arrangement. When the obligor receives proper notice of the assignment, he must honor it.

Time Finance Corp. v. Johnson Trucking Co., 450 P.2d 873, 875 (Utah 1969).

CONCLUSION

Foothill respectfully asks the Court to affirm the lower court's Summary Judgment, Decree of Foreclosure, and Order

of Sale, or otherwise to determine, as a matter of law, that Staker's Complaint fails to state a cause of action against Foothill, and that summary judgment should have been granted, as a matter of law, on Foothill's Counterclaim against Staker.

Respectfully submitted this 22^d day of September, 1988.

JENSEN & LEWIS, P.C.

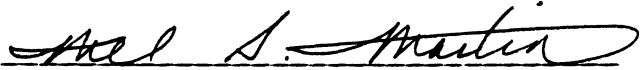
A handwritten signature in cursive script, reading "Mel S. Martin", is written over a horizontal line.

MEL S. MARTIN
Attorneys for Respondent,
Foothill Thrift & Loan Co.

CERTIFICATE OF SERVICE

I hereby certify that on the 22^d day of September I caused to be hand delivered, four (4) true and correct copies of the foregoing Brief of Respondent Foothill Thrift & Loan Co. to:

Joseph C. Rust
Douglas E. Griffith
KESLER & RUST
2000 Beneficial Life Tower
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MEL S. MARTIN

ADDENDUM

- I. STATUTES & RULES
- II. ORDERS OF THIRD JUDICIAL DISTRICT COURT
- III. CONTRACTS, ASSIGNMENT, DEED
- IV. CORRESPONDENCE
- V. DEPOSITION Gerald R. Bagley
- VI. DEPOSITION Thomas G. Bagley
- VII. DEPOSITION Richard L. Sorensen

I. STATUTES & RULES

CHAPTER 4

MARKETING WOOL

(Repealed by Laws 1965, ch. 154, § 10-102)

25-4-1 to 25-4-3. Repealed.

Repeal.

Sections 25-4-1 to 25-4-3 (L. 1931, ch. 54, §§ 1 to 4; R.S. 1933 & C. 1943, 33-4-1 to

33-4-3), relating to the marketing of wool, were repealed by Laws 1965, ch. 154, § 10-102.

CHAPTER 5

STATUTE OF FRAUDS

Section

- 25-5-1. Estate or interest in real property.
- 25-5-2. Wills and implied trusts excepted.
- 25-5-3. Leases and contracts for interest in lands.
- 25-5-4. Certain agreements void unless written and subscribed.
- 25-5-5. Representation as to credit of third person.
- 25-5-6. Promise to answer for obligation of another — When not required to be in writing.
- 25-5-7. Contracts by telegraph deemed written.
- 25-5-8. Right to specific performance not affected.
- 25-5-9. Agent may sign for principal.

25-5-1. Estate or interest in real property. No estate or interest in real property, other than leases for a term not exceeding one year, nor any trust or power over or concerning real property or in any manner relating thereto, shall be created, granted, assigned, surrendered or declared otherwise than by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing.

History: R.S. 1898 & C.L. 1907, §§ 1974, 2461; C.L. 1917, §§ 4874, 5811; R.S. 1933 & C. 1943, 33-5-1.

Compiler's Notes.

Analogous former statute, Comp. Laws 1876, § 1010.

Cross-References.

Contract for sale of goods for \$500 or more unenforceable in absence of some writing, 70A-2-201.

Enforceability of security interests, 70A-9-203.

Securities sales, statute of frauds for contracts, 70A-8-319.

Statute of frauds for kinds of personal property not otherwise covered, 70A-1-206.

Construction and application.

This section does not apply unless there is a contract. *Skeen v. Van Sickle* (1932) 80 U 419, 15 P 2d 344.

The meaning of the word "interest" in this section depends on statutory construction governed by legislative intent. In *re Reynolds' Estate* (1936) 90 U 415, 62 P 2d 270.

Sale implies creation of an estate in excess of a leasehold, by act of the owner. *Lewis v. Dahl* (1945) 108 U 486, 161 P 2d 362, 160 ALR 1040.

Adjoining landowners.

The statute of frauds applies to adjacent landowners, as well as to persons who are not so situated. *Tripp v. Bagley* (1928) 74 U 57, 276 P 912, 69 ALR 1417, distinguished in 10 U 2d 370, 353 P 2d 911.

Agent's authority.

Where, at time agreement for purchase of land was entered into, there was no statute requiring agent's authority to contract for purchase of real estate to be in writing, contract would not be invalidated. *Le Vine v.*

fraud or the violation of a duty imposed under a fiduciary or confidential relationship. *Hawkins v. Perry* (1953) 123 U 16, 253 P 2d 372.

Where defendant altered a certificate of sale of land by inserting his own name as purchaser and the land was not included in the decedent's estate which was distributed in 1924, there was a constructive trust for the benefit of the decedent's heirs and the estate could be reopened. *Perry v. McConkie* (1953) 1 U 2d 189, 264 P 2d 852.

A deed given to secure a debt, though absolute in form, was in equity a mortgage, so that a trust was created by operation of law and, under the express language of this section, was not prevented by 25-5-1. *Taylor v. Turner* (1972) 27 U 2d 39, 492 P 2d 1343.

Parol evidence may be introduced to prove a constructive trust or resulting trust since they arise by operation of law and are expressly excluded from the statute of frauds by this section. In re Estate of Hock (1982) 655 P 2d 1111.

Wills.

When will is sought to be maintained also as a contract, it must satisfy this and succeeding sections of the statute of frauds. *Ward v. Ward* (1938) 96 U 263, 85 P 2d 635.

Collateral References.

Applicability of statute of frauds to contracts to surrender, rescind or abandon trusts, 106 ALR 1313, 173 ALR 281.

Character and validity of instrument as contract as affected by provision for post-mortem payment or performance, 1 ALR 2d 1178.

Decedent's agreement to devise, bequeath, or leave property as compensation for services, 106 ALR 742.

Enforceability, as regards proceeds of sale of property, of real estate trust that does not satisfy statute of frauds, 154 ALR 385.

Grantee's oral promise to grantor as giving rise to trust, 159 ALR 997.

Trust arising by grantee's oral promise to grantor, 35 ALR 280, 45 ALR 851, 80 ALR 195, 129 ALR 689, 159 ALR 997.

DECISIONS UNDER FORMER LAW

Trusts.

Trusts arising by implication or operation of law are expressly excluded from the effects of the statute; and a deed of conveyance,

though absolute in form, if given to secure a debt, is in equity treated as a mortgage — a trust by operation of law. *Wasatch Min. Co. v. Jennings* (1887) 5 U 243, 15 P 65.

25-5-3. Leases and contracts for interest in lands. Every contract for the leasing for a longer period than one year, or for the sale, of any lands, or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, is in writing subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized in writing.

History: R.S. 1898 & C.L. 1907, § 2463; C.L. 1917, § 5813; R.S. 1933 & C. 1943, 33-5-3.

Compiler's Notes.

Analogous former statute, 2 Comp. Laws 1888, § 3918(5).

Agent's authority.

In action for specific performance of contract for sale of real property, held in absence of evidence showing defendant's agent was authorized in writing to sell real property or equities taking case out of statute of frauds, trial court properly granted motion for dismissal of action. *Lee v. Polyhrones* (1921) 57 U 401, 195 P 201.

If there is no contract there cannot, of course, arise any question as to a requirement that it should be in writing and subscribed by the party or his agent. *Skeen v. Van Sickle* (1932) 80 U 419, 15 P 2d 344.

Where real estate agents had no express or implied authority under listing agreement to execute contract of sale of real estate on behalf of vendors, latter were not bound by the terms of an earnest money agreement. *Frandsen v. Gerstner* (1971) 26 U 2d 180, 487 P 2d 697.

There is no requirement that the agent of the lessee or assignee be authorized in writing to execute the lease or assignment. *Zeese v. Estate of Siegel* (1975) 534 P 2d 85.

Introduction of parol evidence was proper to show that agent who made contract in his own name was acting for corporate principal,

annexed to a copy of the document or notice, specifying the times when, and the paper in which, the publication was made.

History: L. 1951, ch. 58, § 1; C. 1943, Summons, proof of publication, Rules of Civil Supp., 104-25-14. Procedure, Rule 4(g).

Cross-References. — Probate notices, publication in newspapers, § 75-1-404.

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d Notice § 31.

C.J.S. — 66 C.J.S. Notice § 21.

Key Numbers. — Notice ⇐ 14.

78-25-15. Filing of affidavit — Original or certified copy as evidence.

If such affidavit is made in an action or special proceeding pending in a court, it may be filed with the court or clerk thereof. If not so made, it may be filed with the recorder of the county where the newspaper is published. In either case the original affidavit, or a copy thereof certified by the judge of the court or officer having it in custody, is prima facie evidence of the facts stated therein.

History: L. 1951, ch. 58, § 1; C. 1943, for copies furnished by party, Rules of Civil Supp., 104-25-15. Procedure, Rule 77(e).

Cross-References. — Officer not to charge

COLLATERAL REFERENCES

Am. Jur. 2d. — 58 Am. Jur. 2d Notice § 31.

C.J.S. — 66 C.J.S. Notice § 21.

78-25-16. Parol evidence of contents of writings — When admissible.

There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

- (1) when the original has been lost or destroyed, in which case proof of the loss or destruction must first be made.
- (2) when the original is in the possession of the party against whom the evidence is offered and he fails to produce it after reasonable notice.
- (3) when the original is a record or other document in the custody of a public officer.
- (4) when the original has been recorded, and the record or a certified copy thereof is made evidence by this code or other statute.
- (5) when the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.

Provided, however, if any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry,

print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced by any photographic, photo-static, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law; and such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not, an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

In the cases mentioned in Subdivisions (3) and (4), a copy of the original, or of the record, must be produced; in those mentioned in Subdivisions (1) and (2), either a copy or oral evidence of the contents.

History: L. 1951, ch. 58, § 1; C. 1943, Supp., 104-25-16; L. 1983, ch. 165, § 1.

Amendment Notes. — The 1983 amendment deleted "unless held in a custodial or fiduciary capacity or" before "unless its preservation is required" in the first sentence of the second paragraph.

Cross-References. — Abstracts of title admissible in evidence, § 1-1-15.

Best evidence rule, when secondary evidence

admissible, Rules of Evidence, Rules 1002, 1004, 1006, 1008.

Contents of writing proven by testimony, deposition or written admission of party against whom it is offered, Rules of Evidence, Rule 1007.

Statute of frauds, § 25-5-1 et seq.

Summaries of writings as proof of contents, Rules of Evidence, Rule 1006.

NOTES TO DECISIONS

ANALYSIS

Original in possession of adverse party.

Secondary evidence.

Summary of noncomplicated exhibits.

Original in possession of adverse party.

Testimony concerning the defendant company's records was properly admitted into evidence as an exception to the best evidence rule where the president of the defendant company, who had custody of the records, refused to grant access to the records and had left the state so the records could not be produced, and the plaintiff had made an attempt to produce the records. *Meyer v General Am. Corp.*, 569 P 2d 1094 (Utah 1977).

Secondary evidence.

Where records should have been kept, and

are not produced, the court should look with extreme caution upon secondary evidence. *Stevens v. Gray*, 123 Utah 395, 259 P.2d 889 (1953).

Summary of noncomplicated exhibits.

Where exhibits attempted to be summarized are neither so numerous nor so complicated that they could not be individually examined and appraised by the jury, the trial court was within its discretion in refusing to admit a proffered summary into evidence. *Shupe v. Menlove*, 18 Utah 2d 130, 417 P.2d 246 (1966).

COLLATERAL REFERENCES

Am. Jur. 2d. — 30 Am. Jur. 2d Evidence § 1016 et seq.; 52 Am. Jur. 2d Lost or Destroyed Instruments § 59.

C.J.S. — 32A C.J.S. Evidence § 851 et seq.; 54 C.J.S. Lost Instruments § 13.

Key Numbers. — Evidence ⇨ 176 et seq.; Lost Instruments ⇨ 8(2).

and the defendant allowed to plead consistent with our declared policy that in case of uncertainty, default judgments should be set aside to allow trial on the merits. *Locke v. Peterson*, 3 Utah 2d 415, 285 P.2d 1111 (1955).

Default judgment and writ of garnishment were properly set aside where trial court failed to obtain jurisdiction over defendant because summons was not timely issued. *Fibreboard Paper Prods. Corp. v. Dietrich*, 25 Utah 2d 65, 475 P.2d 1005 (1970).

Where appellants, plaintiffs in a civil action, promptly objected to date set for trial on the ground that their counsel had an already

scheduled appearance in another court on that date, but due to fact that there were no law or motion days between time objection was filed and trial date, objection was never heard, refusal to set aside default judgment entered when appellants failed to appear on trial date was an abuse of discretion. *Griffiths v. Hammon*, 560 P.2d 1375 (Utah 1977).

Cited in *Utah Sand & Gravel Prods. Corp. v. Tolbert*, 16 Utah 2d 407, 402 P.2d 703 (1965); *J.P.W. Enters., Inc. v. Naef*, 604 P.2d 486 (Utah 1979); *Katz v. Pierce*, 732 P.2d 92 (Utah 1986).

COLLATERAL REFERENCES

Brigham Young Law Review. — Reasonable Assurance of Actual Notice Required for In Personam Default Judgment in Utah: *Graham v. Sawaya*, 1981 B.Y.U. L. Rev. 937.

Am. Jur. 2d. — 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

C.J.S. — 49 C.J.S. Judgments §§ 187 to 218.

A.L.R. — Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

Default judgments against the United States under Rule 55(e) of the Federal Rules of Civil Procedure, 55 A.L.R. Fed. 190.

Key Numbers. — Judgment ⇨ 92 to 134.

Rule 56. Summary judgment.

(a) **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For defending party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a

trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Compiler's Notes. — This rule is similar to Rule 56, F.R.C.P.

Cross-References. — Contempt generally, §§ 78-7-18, 78-32-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Affidavit.
—Contents.
—Corporation.
—Inconsistency with deposition.
—Necessity of opposing affidavits.
—Resting on pleadings.
—Sufficiency.
—Hearsay and opinion testimony.
—Superseding pleadings.
—Unpleaded defenses.
—Verified pleading.

Security interest, assignment, duties of filing officer, 70A-9-405.

Territorial application of act, 70A-1-105.

Collateral References.

Secured Transactions ⇔ 3 to 7, 136, 137, 148 to 150.

79 CJS Supp. Secured Transactions § 5.

68 AmJur 2d 827 to 834, 839 to 846, Secured Transactions §§ 17 to 20, 23 to 27.

Automobiles: priorities as between vendor's lien and subsequent title or security interest obtained in another state to which vehicle was removed, 42 ALR 3d 1168.

Conflict of laws as to chattel mortgages and conditional sales of chattels, 13 ALR 2d 1312.

Constitutionality, construction, and application of statute respecting sale, assignment or transfer of retail installment contracts, 10 ALR 2d 447.

Construction and application of statutory provision respecting registration of mortgages or other liens on personal property in case of residents of other states, 10 ALR 2d 764.

Refiling when goods are removed from district where contract is filed, 68 ALR 554.

Sale of contractual rights; defect in written record as ground for avoiding sale, 10 ALR 2d 728.

DECISIONS UNDER FORMER LAW

Conditional sale of locomotive.

Formerly a conditional sale of a locomotive was valid, as against vendee's creditors,

though it was not executed and recorded as chattel mortgages are required to be. *Lima Machine Works v. Parsons* (1894) 10 U 105, 37 P 244, applying 2 Comp. Laws 1888, § 2314.

70A-9-104. Transactions excluded from chapter. This chapter does not apply

- (a) to a security interest subject to any statute of the United States to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or
- (b) to a landlord's lien; or
- (c) to a lien given by statute or other rule of law for services or materials except as provided in section 70A-9-310 on priority of such liens; or
- (d) to a transfer of a claim for wages, salary or other compensation of an employee; or
- (e) to a transfer by a government or governmental subdivision or agency; or
- (f) to a sale of accounts or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts or chattel paper which is for the purpose of collection only, or a transfer of a right to payment under a contract to an assignee who is also to do the performance under the contract or a transfer of a single account to an assignee in whole or partial satisfaction of a pre-existing indebtedness; or
- (g) to a transfer of an interest or claim in or under any policy of insurance or any contract for an annuity (including a variable annuity), except as provided with respect to proceeds (section 70A-9-306) and priorities in proceeds (section 70A-9-312); or
- (h) to a right represented by a judgment (other than a judgment taken on a right to payment which was collateral); or

- (i) to any right of setoff; or
- (j) except to the extent that provision is made for fixtures in section 70A-9-313, to the creation or transfer of an interest in or lien on real estate, including a lease or rents thereunder; or
- (k) to a transfer in whole or in part of any claim arising out of tort; or
- (l) to a transfer of interest in any deposit account (subsection (1) of section 70A-9-105), except as provided with respect to proceeds (section 70A-9-306) and priorities in proceeds (section 70A-9-312).

History: L. 1965, ch. 154, § 9-104; 1977, ch. 272, § 10.

Priority of security interests in fixtures, 70A-9-313.

Compiler's Notes.

The 1977 amendment deleted "such as the Ship Mortgage Act, 1920" after "United States" in subsec. (a); substituted present subsec. (e) for "(e) to an equipment trust covering railway rolling stock; or"; substituted present subsec. (f) for "(f) to a sale of accounts, contract rights or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts, contract rights or chattel paper which is for the purpose of collection only, or a transfer of a contract right to an assignee who is also to do the performance under the contract; or"; added the exceptions at the end of subsecs. (g) and (h); substituted present subsec. (k) for "(k) to a transfer in whole or in part of any of the following: any claim arising out of tort; any deposit, savings, pass-book or like account maintained with a bank, savings and loan association, credit union or like organization", added present subsec. (l); and made minor changes in phraseology and punctuation.

Cross-References.

Filing, when required to perfect security interest, 70A-9-302, 70A-9-401.

Policy and subject matter of chapter, 70A-9-102.

Priority of certain liens arising by operation of law, 70A-9-310.

Assignment of contract rights.

Absolute assignment of contract right to past-due obligation to pay money constituted a security interest within the meaning of this section. *Consolidated Film Industries v. United States* (1975) 403 F Supp 1279, reversed on other grounds in 547 F 2d 533.

Collateral References.

79 CJS Supp. Secured Transactions § 2.

68 AmJur 2d 847 to 856, Secured Transactions §§ 28 to 32.

Charge for use of machinery, tools, or appliances used in construction as basis for mechanic's lien, 3 ALR 3d 573.

Debtor's transfer of assets to representative of creditors as effectuating release of unsecured claims, in absence of express agreement to that effect, 8 ALR 3d 903.

Mechanic's lien, taking or negotiation of unsecured note of owner or contractor as waiver of, 91 ALR 2d 425.

Secured transactions: priority as between statutory landlord's lien and security interest perfected in accordance with Uniform Commercial Code, 99 ALR 3d 1006.

What constitutes "commencement of building or improvement" for purposes of determining accrual of lien, 1 ALR 3d 822.

70A-9-105. Definitions and index of definitions.

- (1) In this chapter unless the context otherwise requires:
 - (a) "Account debtor" means the person who is obligated on an account, chattel paper or general intangible;
 - (b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods, but a charter or other contract involving the use or hire of a vessel is not chattel paper. When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments,

Promissory note.

Security interest of plaintiff in assets transferred pursuant to bookkeeping entries between two subsidiary corporations was not extinguished by the secured creditor's acceptance of a promissory note from the transferee, and such creditor was entitled to trace its security interest and the proceeds there-

from to recover the debt. First Security Bank of Utah v. Zions First Nat. Bank (1975) 537 P 2d 1024.

Collateral References.

Confusion of Goods ⇔ 8, 9, 11.
15A CJS Confusion of Goods §§ 3-9.
69 AmJur 2d 378, Secured Transactions § 501.

70A-9-316. Priority subject to subordination. Nothing in this chapter prevents subordination by agreement by any person entitled to priority.

History: L. 1965, ch. 154, § 9-316.

Cross-References.

Priorities among conflicting security interests in the same collateral, 70A-9-312.
Variation by agreement, 70A-1-102 (3).

Collateral References.

Secured Transactions ⇔ 147.
79 CJS Supp. Secured Transactions § 72.
69 AmJur 2d 342, Secured Transactions § 478.

70A-9-317. Secured party not obligated on contract of debtor. The mere existence of a security interest or authority given to the debtor to dispose of or use collateral does not impose contract or tort liability upon the secured party for the debtor's acts or omissions.

History: L. 1965, ch. 154, § 9-317.

Cross-References.

Assignment of rights, contract for sale, 70A-2-210.

Collateral References.

Secured Transactions ⇔ 169.
79 CJS Supp. Secured Transactions § 83.
69 AmJur 2d 28, 321, 339, Secured Transactions §§ 205, 465, 475.

70A-9-318. Defenses against assignee — Modification of contract after notification of assignment — Term prohibiting assignment ineffective — Identification and proof of assignment.

- (1) Unless an account debtor has made an enforceable agreement not to assert defenses or claims arising out of a sale as provided in section 70A-9-206 the rights of an assignee are subject to
 - (a) all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom; and
 - (b) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives notification of the assignment.
- (2) So far as the right to payment or a part thereof under an assigned contract has not been fully earned by performance, and notwithstanding notification of the assignment, any modification of or substitution for the contract made in good faith and in accordance with reasonable commercial standards is effective against an assignee unless the account debtor has otherwise agreed but the assignee acquires corresponding rights under the modified or substituted contract. The assignment may provide that such modification or substitution is a breach by the assignor.
- (3) The account debtor is authorized to pay the assignor until the account debtor receives notification that the amount due or to

become due has been assigned and that payment is to be made to the assignee. A notification which does not reasonably identify the rights assigned is ineffective. If requested by the account debtor, the assignee must seasonably furnish reasonable proof that the assignment has been made and unless he does so the account debtor may pay the assignor.

- (4) A term in any contract between an account debtor and an assignor is ineffective if it prohibits assignment of an account or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest.

History: L. 1965, ch. 154, § 9-318; 1977, ch. 272, § 26.

Compiler's Notes.

The 1977 amendment substituted "payment or a part thereof under an assigned contract has not been fully earned by performance" near the beginning of subsec. (2) for "payment under an assigned contract right has not already become an account"; substituted "that the amount due or to become due" in the middle of the first sentence of subsec. (3) for "that the account"; substituted "is ineffective if it prohibits assignment of an account" near the beginning of subsec. (4) for "which prohibits assignment of an account or contract right to which they are parties is ineffective"; added "or prohibits creation of a security interest in a general intangible for money due or to become due or requires the account debtor's consent to such assignment or security interest" at the end of subsec. (4); and made a minor change in punctuation.

Cross-References.

Agreement not to assert defenses against assignee, 70A-9-206.

Assignment of rights, contract for sale, 70A-2-210.

Credit, right to draw under, transfer and assignment, 70A-5-116.

Purchase of chattel paper and instruments, 70A-9-308.

Use or disposition of collateral without accounting permissible, 70A-9-205.

Insufficient notice of assignment.

Where bank did not deal directly with purchaser, but relied on an officer of seller's corporation who procured signatures on letters acknowledging assignment by delivering them personally to an unauthorized employee of purchaser who worked at a different building than the address printed on the invoices, the bank had not taken such steps as were reasonably required to inform purchaser of the assignments. *Bank of Salt Lake v. Corporation of the President of the Church of Jesus Christ of Latter-Day Saints* (1975) 534 P 2d 887.

Collateral References.

Secured Transactions ⇌ 181, 185, 187 to 191.

79 CJS Supp. Secured Transactions §§ 88 to 96.

69 AmJur 2d 293 to 311, Secured Transactions §§ 444 to 457.

PART 4

FILING

Section

70A-9-401. Place of filing — Erroneous filing — Removal of collateral.

70A-9-402. Formal requisites of financing statement — Amendments — Mortgage as financing statement.

70A-9-403. What constitutes filing — Required statement — Duration of filing — Effect of lapsed filing — Duties of filing officer.

70A-9-404. Termination statement.

70A-9-405. Assignment of security interest — Duties of filing officer — Fees.

70A-9-406. Release of collateral — Duties of filing officer — Fees.

70A-9-407. Information from filing officer.

70A-9-408. Financing statements covering consigned or leased goods.

70A-9-409. Destruction of old records.

II. ORDERS ~~OF~~ THIRD JUDICIAL DISTRICT COURT

FILMED

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FILED IN CLERK'S OFFICE
SEP 11 1987

DEC 11 1987

DeBundler

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STAKER PAVING AND CONSTRUCTION
COMPANY, INC., a Utah
corporation,

Plaintiff,

vs.

GERALD H. BAGLEY, individually
and dba WEST JORDAN PROPERTIES,
and FOOTHILL THRIFT, et al.,

Defendants.

ORDER

Civil No. C85-7088

Judge Russon

Motion for Summary Judgment by Foothill Thrift and Loan came on regularly for hearing on the 9th day of November, 1987, at the hour of 10:00 a.m., before the Honorable Leonard H. Russon, pursuant to notice. Plaintiff was represented by its attorneys of record, Joseph C. Rust and Douglas E. Griffith; Defendant Foothill Thrift and Loan was represented by its attorney of record, Mel S. Martin of Jensen & Lewis, P.C.; and Defendant Utah Power and Light Co. was represented by its attorney, Rosemary Richardson. The Court having heard arguments of counsel, having reviewed the pleadings and file hereof, including the memorandums and affidavits filed by the parties, and being fully advised in the premises, determined that the

uniform real estate contract dated July 1, 1977, is clear and unambiguous and had not been modified by the parties course of dealing. Therefore, the Court now makes and enters its:

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the motion for summary judgment by Foothill Thrift and Loan is partially granted as follows:

1. The uniform real estate contract, dated July 1, 1977, by and between West Jordan Properties as seller and Staker Paving and Construction Co., Inc., as purchaser, is clear and unambiguous.

2. The parties to the contract did not intend to modify the payment terms of the contract by their course of dealing and there is no evidence that the contract was otherwise modified.

3. There is no remaining issue of fact as to the enforcement of the uniform real estate contract as written.

4. When the purchaser under the contract was placed on notice of the assignment, March 22, 1985, the purchaser became bound to pay Foothill Thrift and Loan the balance owed pursuant to the terms of the real estate contract.

5. The sole issue remaining for trial, as between Foothill Thrift and Loan and the Plaintiff, is to determine the balance that was owed under the real estate contract as of the date, when it was assigned, to Foothill Thrift and Loan, and when

Foothill notified the Plaintiff of the assignment, on or about March 22, 1985.

DATED this 11th day of December, 1987.

ATTEST
H. DIXON HINDLEY
Clerk

By [Signature]
Deputy Clerk

BY THE COURT:

[Signature]
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 11th day of November, 1987, I mailed a true and correct copy of the foregoing Order, postage prepaid, addressed to the following:

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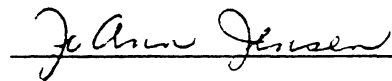
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_____

FILED

THIRD JUDICIAL DISTRICT

County of Salt Lake - State of Utah

Staker Paving & Construction Co Inc
Plaintiff

Derald H. Bagley, et al
Defendant

CASE NO: C 85-7088

Type of hearing: Div. _____ Annul. _____ Supp. Order _____ OSC. _____ Other _____
 Present: Pltf. _____ Deft. _____
 P. Atty: Doug Griffith ✓
 D. Atty: Neil S. Miller ✓
 Sworn & Examined:
 Pltf: _____ Deft: _____
 Others: _____
 Summons _____ Stipulation _____
 Waiver _____ Publication _____
☐ Default of Pltf/Deft Entered
 Date: Dec. 14, 1987
 Judge: Leonard H. Runkon
 Clerk: Lundberg
 Reporter: _____
 Bailiff: K. Lue

ORDERS:

- ☐ Custody Evaluation Ordered ☐ Custody Awarded To _____
☐ Visitation Rights _____
☐ Pltf/Deft Awarded Support \$ _____ x _____ = _____ Per Month
☐ Pltf/Deft Awarded Alimony \$ _____ Per Month/Year ☐ Alimony Waived
☐ Payments to be made through the Clerk's Office: _____
☐ Atty. fees to the _____ in the amount of _____ ☐ Deferred
☐ Home To: _____
☐ Furnishings To: _____ Automobile To: _____
☐ Each Party Awarded their Personal Property
☐ Pltf/Deft. to Maintain Debts and Obligations
☐ Pltf/Deft. to Maintain Insurance on Minor Children
☐ Restraining Order Entered Against _____
☐ Pltf/Deft. Granted Judgment for Arrearage in the Sum of \$ _____
☐ 90-Day Waiting Period is Waived
☐ Divorce Granted To _____ As _____
☐ Decree To Become Final: ☐ Upon Entry ☐ 3-Month Interlocutory
☐ Former Name of _____ Is Restored
☐ Based on the failure of Deft to appear in response to an order of the court and on motion of Pltfs counsel, court orders _____ / _____ shall issue for Deft. _____
 Returnable _____ Bail _____
☐ Based on written stipulation of respective counsel/motion of Plaintiff's counsel, and good cause appearing therefor, court orders the above case be and the same is hereby dismissed without prejudice.
☒ Based on ^{Arguments} ~~written stipulation~~ of respective counsel/motion of Plaintiff's counsel, court orders _____
Pltfs objection to depts. Attorney Shupis proposed order
is resolved.

Kay M. Lewis (Bar No. 1944)
Mel S. Martin (Bar No. 2102)
JENSEN & LEWIS, P. C.
Attorneys for Defendant
Foothill Thrift
320 South 300 East, Suite 1
Salt Lake City, Utah 84111
Telephone: 328-4981

FILED IN CLERKS OFFICE
SALT LAKE COUNTY, UTAH

DEC 22 4 55 PM '81

H. DICKSON HINDLEY CLERK
DISTRICT COURT
BY *Barbara Bohm*
DEPUTY CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STAKER PAVING AND CONSTRUCTION
COMPANY, INC., a Utah
corporation,

Plaintiff,

vs.

GERALD H. BAGLEY, individually
and dba WEST JORDAN PROPERTIES,
and FOOTHILL THRIFT, et al.,

Defendants.

ORDER

Civil No. C85-7088

Judge Russon

Motion for Summary Judgment by Foothill Thrift and Loan came on regularly for hearing on the 9th day of November, 1987, at the hour of 10:00 a.m., before the Honorable Leonard H. Russon, pursuant to notice. Plaintiff was represented by its attorneys of record, Joseph C. Rust and Douglas E. Griffith; Defendant Foothill Thrift and Loan was represented by its attorney of record, Mel S. Martin of Jensen & Lewis, P.C.; and Defendant Utah Power and Light Co. was represented by its attorney, Rosemary Richardson. The Court having heard arguments of counsel, having reviewed the pleadings and file hereof, including the memorandums and affidavits filed by the parties, and being fully advised in the premises, determined that the

uniform real estate contract dated July 1, 1977, is clear and unambiguous and had not been modified by the parties course of dealing. Therefore, the Court now makes and enters its:

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the motion for summary judgment by Foothill Thrift and Loan is partially granted as follows:

1. The uniform real estate contract, dated July 1, 1977, by and between West Jordan Properties as seller and Staker Paving and Construction Co., Inc., as purchaser, is clear and unambiguous.

2. No parol evidence will be allowed to modify the contract.

3. There is no remaining issue of fact as to the enforcement of the uniform real estate contract as written.

4. When the purchaser under the contract was placed on notice of the assignment, March 22, 1985, the purchaser became bound to pay Foothill Thrift and Loan the balance owed pursuant to the terms of the real estate contract.

5. The sole issue remaining for trial, as between Foothill Thrift and Loan and the Plaintiff, is to determine the balance that was owed under the real estate contract as of the date when Foothill notified the Plaintiff of the assignment, on or about March 22, 1985.

DATED this 16th day of December, 1987.

ATTEST
H. DIXON HINDLEY
Clerk

BY THE COURT:

By

Barbara Bohne
Deputy Clerk

Leonard S. Russ
DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of December, 1987, I mailed a true and correct copy of the foregoing Order, postage prepaid, addressed to the following:

Joseph C. Rust
Douglas E. Griffith
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Attorneys for Plaintiff

Barbara L. Maw
Strong and Hanni
Sixth Floor, Boston Building
Salt Lake City, Utah 84111
Attorney for Claude Curley

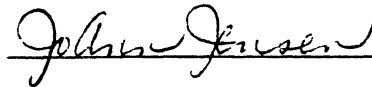
Rosemary Richardson
Utah Power and Light Company
P.O. Box 899
Salt Lake City, Utah 84116
Attorney for Utah Power and Light Company

Ralph J. Marsh
Backman, Clark and Marsh
68 South Main, #800
Salt Lake City, Utah 84101
Attorney for Gerald H. Bagley,
G. H. Bagley, Inc., and
Gerald H. Bagley Family Partnership

Steven E. Tyler
Callister, Duncan & Nebeker
Kennecott Building, Suite 800
Salt Lake City, Utah 84133
Attorney for Defendant Magna-Garfield Employees'
Thrift Plan

Bryan W. Cannon
Poole, Cannon & Smith
360 Prowswood Plaza
4885 South 900 East
Salt Lake City, Utah 84117
Attorney for Defendants Elmer and Lois Jensen

Bruce A. Maak
Kimball, Parr, Crockett & Waddoups
Suite 1300, 185 South State Street
P.O. Box 11019
Salt Lake City, Utah 84147
Attorney for Third-Party Defendant
Tracy Mortgage Company

_____

Kay M. Lewis Bar No. (1944)
Mel S. Martin Bar No. (2102)
JENSEN & LEWIS, P.C.
Attorneys for Defendant
Foothill Thrift
320 South 300 East, Suite 1
Salt Lake City, Utah 84111
Telephone: 328-4981

FILED IN CLERK'S OFFICE

MAY 2 1988

Barbara Bohne

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STAKER PAVING AND CONSTRUCTION
COMPANY, INC., a Utah
corporation,

Plaintiff,

vs.

GERALD H. BAGLEY, individually
and dba WEST JORDAN PROPERTIES,
and FOOTHILL THRIFT, et al.

Defendants.

CLAUDE CURLEY,

Third-Party Plaintiff,

vs.

TRACY MORTGAGE COMPANY,

Third-Party Defendant.

BK 213 No. 9709
5-3-88 8:14 AM

SUMMARY JUDGMENT, DECREE
OF FORECLOSURE AND
ORDER OF SALE

Civil No. C85-7088

Judge Russon

Motion for Summary Judgment by Foothill Thrift and Loan came on regularly for hearing on the 11th day of April, 1988 at the hour of 10:00 a.m., before the Honorable Leonard H. Russon, pursuant to Notice. Plaintiff was represented by its attorney of record, Douglas E. Griffith; Defendant Foothill Thrift and Loan was represented by its attorney of record, Mel S. Martin of JENSEN

& LEWIS, P.C.; and Defendant Utah Power and Light Co. was represented by its attorney of record, Rosemary Richardson. The Court having heard arguments of counsel, having reviewed the pleadings on file hereof, including the Memorandums and Affidavits filed by the parties, and being fully advised in the premises, determined that there does not exist any genuine issues of material fact as between the Plaintiff and Defendant Foothill Thrift, concerning the allegations set forth in the Amended Complaint and those in Foothill Thrift's Counterclaim against the Plaintiff. Therefore, the Court now makes and enters its:

ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Motion for Summary Judgment by Foothill Thrift and Loan is granted as follows:

1. Plaintiff's Amended Complaint is dismissed against Defendant Foothill Thrift & Loan, with prejudice, for failure to state a claim upon which relief may be granted.

2. Defendant's Motion for Summary Judgment on its Counterclaim is granted, for the amount owed under the following described real estate contract, and for a Decree of Foreclosure and Order of Sale of the subject real property, described in that certain Uniform Real Estate Contract dated July 1, 1977, covering land in Salt Lake County, Utah, described as follows:

Northeast quarter Section 27, Township 2
South, Range 2 West, Salt Lake Base and
Meridian.

3. A Judgment for Decree of Foreclosure and Order of Sale is granted against Plaintiff and in favor of Defendant Foothill Thrift, for the balance owing under the real estate contract (\$98,471.84), together with 7 1/2 % interest per annum, accrued from July 1, 1984; until the Judgment is satisfied. The amount owed as of April 11, 1988, was \$129,495.02.

4. Pursuant to Paragraph 21 of the real estate contract, Plaintiff shall pay all costs and expenses, including a reasonable attorney's fee in an amount to be determined by the Court after review of counsel's affidavit, which costs, expenses and fee the Defendant Foothill Thrift has incurred to enforce the contract; further, Plaintiff shall pay all costs and expenses, including additional attorney's fees which may be incurred to proceed with enforcement of the contract.

5. The real estate contract is a good and sufficient lien upon the premises and may be foreclosed as a note and mortgage and the premises may be sold by the Sheriff of Salt Lake County subject to prior liens, easements, and encumbrances, if any, in accordance with the law and practice of this Court and in accordance of the laws of the State of Utah.

6. The proceeds of said sale shall be applied first to the satisfaction of the accrued and accruing costs of this action, including attorney fees, and then upon the sum and sums awarded to Foothill Thrift; the surplus, if any, of monies received from the sale shall be accounted for and paid by the Sheriff to the Clerk of this Court subject to its further Order.

7. In the event that the return of the Sheriff discloses a deficiency, then Defendant Foothill Thrift shall have Judgment against the Plaintiff for such deficiency.

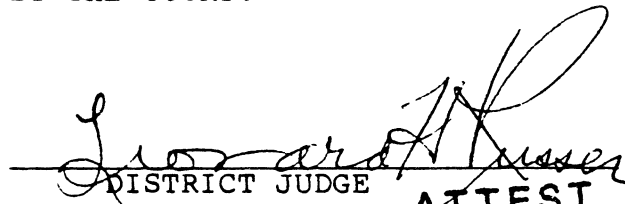
8. Any party may purchase the premises at the said sale, and the Sheriff may issue his certificate of sale and grant possession to the purchaser of the premises and the Sheriff shall have all proper process of this Court on that behalf at the time the Judgment is entered herein.

9. All right, title, and interest of any party, claiming an interest adverse to the interest of Foothill Thrift, with the exception of prior liens, easements, and encumbrances, if any, shall be forever barred, save the statutory right of redemption.

10. There being no matters left unresolved as between the Plaintiff and Foothill Thrift, and no just reason for delaying entry of a final judgment, entry of judgment is hereby ordered.

DATED this 9th day of May, 1988.

BY THE COURT:


DISTRICT JUDGE

ATTEST
H. DIXON HINDLEY
Clerk

By 
Deputy Clerk

Affidavits submitted:

Larry Grant
Richard Dover
Mel Martin

000556

CERTIFICATE OF MAILING

I hereby certify that on the 21ST day of APRIL, 1988, I mailed a true and correct copy of the foregoing Summary Judgment, Decree of Foreclosure and Order of Sale, postage prepaid, addressed to the following:

Joseph C. Rust
Douglas E. Griffith
KESLER AND RUST
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

Barbara L. Maw
Strong and Hanni
Sixth Floor, Boston Building
Salt Lake City, Utah 84111
Attorney for Claude Curley

Rosemary Richardson
Utah Power and Light Company
P.O. Box 899
Salt Lake City, Utah 84116
Attorney for Utah Power and Light Company

Ralph J. Marsh
Backman, Clark and Marsh
68 South Main, #800
Salt Lake City, Utah 84101
Attorney for Gerald H. Bagley,
G. H. Bagley, Inc., and
Gerald H. Bagley Family Partnership

Steven E. Tyler
Callister, Duncan & Nebeker
Kennecott Building, Suite 800
Salt Lake City, Utah 84133
Attorney for Defendant Magna-Garfield Employees'
Thrift Plan

Bryan W. Cannon
Poole, Cannon & Smith
360 Prowswood Plaza
4885 South 900 East
Salt Lake City, Utah 84117
Attorney for Defendants Elmer and Lois Jensen

Bruce A. Maak
Kimball, Parr, Crockett & Waddoups
Suite 1300, 185 South State Street
P. O. Box 11019
Salt Lake City, Utah 84147
Attorney for Third-Party Defendant
Tracy Mortgage Company

Ann McDonald

III. CONTRACTS, ASSIGNMENT, DEED

THIS IS A LEGALLY BINDING CONTRACT. IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE.

UNIFORM REAL ESTATE CONTRACT

1. THIS AGREEMENT, made in duplicate this 1st day of July, A. D., 1977
by and between West Jordan Properties
hereinafter designated as the Seller, and Staker Paving & Construction Company, Inc.
hereinafter designated as the Buyer, of 145.203 acres

2. WITNESSETH: That the Seller, for the consideration herein mentioned agrees to sell and convey to the buyer, and the buyer for the consideration herein mentioned agrees to purchase the following described real property, situate in the county of Salt Lake, State of Utah, to-wit: _____ ADDRESS _____
More particularly described as follows:

Northeast quarter section 27, township 2 south,
range 2 west, Salt Lake Base and Meridian,
Salt Lake County

3. Said Buyer hereby agrees to enter into possession and pay for said described premises the sum of Four
Hundred Thirty-five Thousand Six Hundred Nine & no/100 Dollars (\$435,609.00)
payable at the office of Seller, his assigns or order _____
strictly within the following times, to-wit: Eighty-seven Thousand Five Hundred 87,500.00
cash, the receipt of which is hereby acknowledged, and the balance of \$ 348,109.00 shall be paid as follows:

\$54,572.06 Annual Payment, due July 1, 1978,
and each consecutive July 1st thereafter until
paid in full.

Possession of said premises shall be delivered to buyer on the 1st day of July, 1977

4. Said monthly payments are to be applied first to the payment of interest and second to the reduction of the principal. Interest shall be charged from July 1, 1977 on all unpaid portions of the purchase price at the rate of seven 7 per cent (7 1/2 %) per annum. The Buyer, at his option at anytime, may pay amounts in excess of the monthly payments upon the unpaid balance subject to the limitations of any mortgage or contract by the Buyer herein assumed, such excess to be applied either to unpaid principal or in prepayment of future installments at the election of the buyer, which election must be made at the time the excess payment is made.

5. It is understood and agreed that if the Seller accepts payment from the Buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated, or as to any other remedies of the seller.

6. It is understood that there presently exists an obligation against said property in favor of _____ with an unpaid balance of \$ 55,000.00, as of _____

7. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against said property, except the following none

8. The Seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed 7 1/2 percent (7 1/2 %) per annum and payable in regular monthly installments; provided that the aggregate monthly installment payments required to be made by Seller on said loans shall not be greater than each installment payment required to be made by the Buyer under this contract. When the principal due hereunder has been reduced to the amount of any such loans and mortgages the Seller agrees to convey and the Buyer agrees to accept title to the above described property subject to said loans and mortgages.

9. If the Buyer desires to exercise his right through accelerated payments under this agreement to pay off any obligations outstanding at date of this agreement against said property, it shall be the Buyer's obligation to assume and pay any penalty which may be required on prepayment of said prior obligations. Prepayment penalties in respect to obligations against said property incurred by seller, after date of this agreement, shall be paid by seller unless said obligations are assumed or approved by buyer.

10. The Buyer agrees upon written request of the Seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the Seller agreeing to pay the other one-half, provided however, that the monthly payments and interest rate required, shall not exceed the monthly payments and interest rate as outlined above.

11. The Buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The Seller hereby covenants and agrees that there are no assessments against said premises except the following:

The Seller further covenants and agrees that he will not default in the payment of his obligations against said property.

EXHIBIT "A"

12. The Buyer agrees to pay the general taxes after July 1, 1977

13. The Buyer further agrees to keep all insurable buildings and improvements on said premises insured in a company acceptable to the Seller in the amount of not less than the unpaid balance on this contract, or \$ - - - and to assign said insurance to the Seller as his interests may appear and to deliver the insurance policy to him.

14. In the event the Buyer shall default in the payment of any special or general taxes, assessments or insurance premiums as herein provided, the Seller may, at his option, pay said taxes, assessments and insurance premiums or either of them, and if Seller elects so to do, then the Buyer agrees to repay the Seller upon demand, all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of 1/2 of one percent per month until paid.

15. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

16. In the event of a failure to comply with the terms hereof by the Buyer, or upon failure of the Buyer to make any payment or payments when the same shall become due, or within 30 days thereafter, the Seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the Buyer to remedy the default within five days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the Buyer, shall be forfeited to the Seller as liquidated damages for the non-performance of the contract, and the Buyer agrees that the Seller may at his option re-enter and take possession of said premises without legal processes as in its first and former estate, together with all improvements and additions made by the Buyer thereon, and the said additions and improvements shall remain with the land become the property of the Seller, the Buyer becoming at once a tenant at will of the Seller; or

B. The Seller may bring suit and recover judgment for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall not prevent the Seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. The Seller shall have the right, at his option, and upon written notice to the Buyer, to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the Buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorney's fees; and the Seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the Seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the Seller, upon entry of judgment of foreclosure, shall be entitled to the possession of the said premises during the period of redemption.

17. It is agreed that time is the essence of this agreement.

18. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided for shall hereafter accrue against the same by acts or neglect of the Seller, then the Buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the Buyer, be suspended until such time as such suspended payments shall equal any sums advanced as aforesaid.

19. The Seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the Buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the Buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price or at the option of the Seller, an abstract brought to date at time of sale or at any time during the term of this agreement, or at time of delivery of deed, at the option of Buyer.

20. It is hereby expressly understood and agreed by the parties hereto that the Buyer accepts the said property in its present condition and that there are no representations, covenants, or agreements between the parties hereto with reference to said property except as herein specifically set forth or attached hereto - - - -

21. The Buyer and Seller each agree that should they default in any of the covenants or agreements contained herein, that the defaulting party shall pay all costs and expenses, including a reasonable attorney's fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing a suit or otherwise.

22. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties to this agreement have hereunto signed their names, the day and year first above written.

Signed in the presence of

[Signature]
Seller
[Signature]
Buyer

Approved Form:
BLANK REV. 1-66-59 51 GLEN PRINTING CO. - SALT LAKE CITY

To

Uniform Real Estate Contract

No.

BIDDER AGREES to perform all work described in the contract documents for the following unit prices or lump sum:

BID SCHEDULE

NOTE: Bids shall include sales tax and all other applicable taxes and fees.

NO.	ITEM	UNIT	QUANTITY	UNIT PRICE	TOTAL PRICE
SCHEDULE A					
1.	Furnish and Provide to Site Untreated Base Course as Specified	C.Y.	4,900		-0-
TOTAL, SCHEDULE A					

SCHEDULE B

1.	Place and Compact 6-Inch Untreated Base Course, Complete	L.S.	L.S.	L.S.	10,976.00
2.	Furnish and Place 4-Inch Bituminous Surface, Complete	C.Y.	3,265	46.21	150,875.65
3.	Cut and Remove Existing Concrete Curb and Gutter	L.F.	51	5.95	303.45
4.	Furnish and Install Concrete Curb and Gutter, Complete	L.F.	13,720	5.16	70,795.20
TOTAL, SCHEDULE B					\$232,950.30
TOTAL, SCHEDULES A AND B					

AWARD OF SCHEDULES OF WORK

The Contractor may submit a proposal for single, or all schedules. The Owner reserves the right to award each schedule as a separate contract, or as a combination of two or more of the above schedules, depending upon what is received and whatever condition is deemed to be in the best interest of the Owner.

DAVE YOUNG *Tracy, ALICIA - 328-0110*

Bid Schedule
Continued

Respectfully Submitted:

Arthur H. Shaker
Signature

Chairman
Title

15521 S. 530 WEST DENVER CO 8020
Address

6/8/83
Date

License No. (if applicable): A 9-20081

(SEAL - IF BID IS BY A CORPORATION)

ATTEST: Ad JTH

AGREEMENT made this 13th day of June, 1980, by
and between BAGLEY & COMPANY hereinafter called "OWNER"
(Name of Owner), (an individual)

and STAKER PAVING & CONSTRUCTION CO. doing business as (an individual.) or (a
partnership.) or (a corporation) hereinafter called "CONTRACTOR".

WITNESSETH: That for and in consideration of the payments and agreements herein-
after mentioned:

1. The CONTRACTOR will commence and complete the construction of
Roadway improvements for West Jordan Industrial Park No. 2
2. The CONTRACTOR will furnish all of the material, supplies, tools, equipment,
labor and other services necessary for the construction and completion of the PROJECT
described herein.
3. The CONTRACTOR will commence the work required by the CONTRACT DOC-
UMENTS within _____ calendar days after the date of the NOTICE TO PRO-
CEED and will complete the same within _____ calendar days unless the period
for completion is extended otherwise by the CONTRACT DOCUMENTS:
4. The CONTRACTOR agrees to perform all of the WORK described in the CON-
TRACT DOCUMENTS and comply with the terms therein for the sum of \$ _____
or as shown in the BID schedule.
5. The term "CONTRACT DOCUMENTS" means and includes the following:
 - (A) Advertisement For BIDS
 - (B) Information For BIDDERS
 - (C) BID
 - (D) BID BOND
 - (E) Agreement

(H) Payment BOND

(I) Performance BOND

(J) NOTICE OF AWARD

(K) NOTICE TO PROCEED

(L) CHANGE ORDER

(M) DRAWINGS prepared by _____
numbered _____ through _____, and dated _____
19 _____

(N) SPECIFICATIONS prepared or issued by _____

dated _____, 19 _____

(O) ADDENDA:

No. _____, dated _____, 19 _____

No. _____, dated _____, 19 _____

No. _____, dated _____, 19 _____

No. _____, dated _____, 19 _____

No. _____, dated _____, 19 _____

No. _____, dated _____, 19 _____

6. The OWNER will pay to the CONTRACTOR in the manner and at such times as set forth in the General Conditions such amounts as required by the CONTRACT DOCUMENTS.

7. This Agreement shall be binding upon all parties hereto and their respective heirs, executors, administrators, successors, and assigns.

IN WITNESS WHEREOF, the parties hereto have executed, or caused to be executed by their duly authorized officials, this Agreement in (_____) each of which shall be deemed an original on the date first above written.

(Number of Copies)

DI _____
Name Gerald N. Bagley
(Please Type)

Title _____

EAL)

TTEST:

ame _____
(Please Type)

itle _____

CONTRACTOR:

STAKER TRAVING & CONST CO. INC

BY

Name _____
(Please Type)

Address 15521 SO. 500 WEST

DRAPER, UTAH 84020

SEAL)

TTEST:

ame _____
(Please Type)

4063750

"THIS IS A LEGALLY BINDING CONTRACT IF NOT UNDERSTOOD, SEEK COMPETENT ADVICE."

WHEN RECORDED RETURN TO: Foothill Thrift 1304 Foothill Dr. SLC, Ut. 84108

ASSIGNMENT OF CONTRACT

THIS AGREEMENT, made in the City of Salt Lake, State of Utah on the 12th day of March, 1985 by and between West Jordan Properties hereinafter referred to as the assignors, and Foothill Thrift hereinafter referred to as the assignees,

WITNESSETH:

WHEREAS, under date of July 1, 1977, West Jordan Properties as sellers, entered into a Uniform Real Estate Contract with Staker Paving and Construction Company, Inc. as buyers, of Salt Lake, Utah, which contract is delivered herewith, wherein and whereby the said sellers agreed to sell and the said buyers agreed to purchase, upon the terms, conditions, and provisions therein set forth, all that certain land, with the buildings and improvements thereon, erected, situate, lying and being in the County of Salt Lake, State of Utah, and more particularly described as follows:

The Northeast Quarter of Section 27, Township 2 South, Range 2 West, Salt Lake Base & Meridian.

EXCEPTING THEREFROM THE FOLLOWING:

(See Attached Exhibit "A")

to which agreement in writing, reference is hereby made for all of the terms, conditions and provisions thereof, and

WHEREAS, the assignees desire to acquire from the assignors all of the right, title and interest of the assignors in said property above described as evidenced by said written agreement.

NOW, THEREFORE, it is hereby mutually agreed as follows:

1. That the assignors in consideration of the Payment of Ten Dollars and other good and valuable consideration, the receipt of which is hereby acknowledged, assign to the assignees, all their right, title and interest in and to said above described property as evidenced by the aforesaid Uniform Real Estate Contract of July 1, 1977 concerning the above described property.

2. That to induce the assignees to pay the said sum of money and to accept the said contract, and the rights obligation pursuant thereto the assignors hereby represent to the assignees as follows:

- That the assignors have duly performed all the conditions of the said contract.
- That the contract is now in full force and effect and that the unpaid balance of said contract is \$ 98,471.84, with interest paid to the 9th day of July, 1984.
- That said contract is assignable.

3. That in consideration of the assignors executing and delivering this agreement, the assignees covenant with the assignors as follows:

- That the assignees will duly keep, observe and perform all of the terms, conditions and provisions of the said agreement that are to be kept, observed and performed by the assignors.
- That the assignees will save and hold harmless the assignors of and from any and all actions, suits, costs, damages, claims and demands whatsoever arising by reason of an act or omission of the assignees.

IN WITNESS WHEREOF, the assignors hereto have hereunto set their hands and seals the day and year first above written.

On the 12th day of March, 1985 personally appeared before me GEORGE H. RAGLEY, the signer of the within instrument, who duly acknowledged to me that he executed the same.

By: [Signature]
ASSIGNORS

Kathleen R. Mangione
Notary Public, Commission Expires Nov. 21, 1986
Residing in Salt Lake

On the 12th day of March, 1985 personally appeared before me LARRY E. GRANT, the signer of the within instrument, who duly acknowledged to me that he executed the same.

By: [Signature]
ASSIGNEES

Kathleen R. Mangione
Notary Public, Commission Expires Nov. 21, 1986
Residing in Salt Lake

BLANK NO. 116 - Q GEN. PTO. CO. - 3215 SO. 2900 EAST - SALT LAKE CITY

EXHIBIT "C"

BTC 57901 E

BOOK 5638 PAGE 1775

Property situated in Salt Lake County, State of Utah:

BEGINNING at a point South 0°27'56" East 359.6 feet along the East section line from the Northeast corner of Section 27, Township 2 South, Range 2 West, Salt Lake Base and Meridian, and running thence South 0°27'56" East 2275.08 feet along the East section line to the East quarter corner of said Section 27; thence South 89°56'39" West along the quarter section line to the East boundary of the Kennecott Copper Corp. Railroad Right-of-Way; thence North 33°01' East 1160.6 feet along the East boundary of said railroad right-of-way; thence North 56°59' West 12.5 feet; thence North 33°01' East along the East boundary of said right-of-way to a point South 33°01' West 1150.7 feet from the intersection of the East boundary of said right-of-way with the North line of said Section 27; thence North 63°26'10" East 1353.8 feet to the point of beginning.

259
MAR 21 9 57 AM '05
SALT LAKE COUNTY, UTAH
RECORDED
INDEXED
BY
CLERK

BOOK 5638 PAGE 1776

Return to: Foothill Thrift 1304 Foothill Dr. SLC, Ut. 84108
Recorded at Request of Foothill Thrift 1304 Foothill Drive SLC 84108
at M. Fee Paid \$
by Dep. Book Page Ref:
Mail tax notice to Address

4063749 QUIT-CLAIM DEED

West Jordan Properties, A Partnership

of Salt Lake City, County of Salt Lake, State of Utah, hereby
QUIT-CLAIM to

Foothill Thrift

of Salt Lake City grantee
-----ten----- for the sum of
DOLLARS,

the following described tract of land in Salt Lake County,
State of Utah:

27 The Northeast Quarter of Section 27, Township 2 South, Range
2 West, Salt Lake Base & Meridian.

EXCEPTING THE FOLLOWING:

BEGINNING at a point South 0°27'56" East 359.6 feet along the East
section line from the Northeast corner of Section 27, Township 2
South, Range 2 West, Salt Lake Base and Meridian, and running thence
South 0°27'56" East 2275.08 feet along the East section line to the
East quarter corner of said Section 27; thence South 89°56'39" West
along the quarter section line to the East boundary of the Kennecott
Copper Corp. Railroad Right-of-Way; thence North 33°01' East 1160.6
feet along the East boundary of said railroad right-of-way; thence
North 56°59' West 12.5 feet; thence North 33°01' East along the East
boundary of said right-of-way to a point South 33°01' West 1150.7
feet from the intersection of the East boundary of said right-of-way
with the North line of said Section 27; thence North 63°26'10" East
1353.8 feet to the point of beginning.

WITNESS the hand of said grantor, this 12th. day of
March, A. D. one thousand nine hundred and Eighty Five

Signed in the presence of

West Jordan Properties

By: Gerald H. Bagley, General Partner

STATE OF UTAH.

COUNTY OF SN.

On the 12th. day of March A.D. 19 85
personally appeared before me Gerald H. Bagley

the signer of the within instrument, who duly acknowledged to me that he executed the
same.

KATHLEEN R. MAHONEY
NOTARY PUBLIC
Commission Expires Nov 21, 1985
Kathleen R. Mahoney
Notary Public.
My commission expires . Residing in Salt Lake

EXHIBIT "D"

37 106657901 E

BOOK 5638 PAGE 1773

IV. CORRESPONDENCE



STAKER PAVING AND
CONSTRUCTION CO. INC.
A Construction Management Co.
P.O. Box 27598
Salt Lake City, Utah 84127-0598
Telephone
(801) 298-7500

February 14, 1985

Mr. Richard Sorenson
Bagley Corporation
P.O. Box 17230
Salt Lake City, UT 84117

RE: Real Estate Agreement - West Jordan Properties/Staker Paving
& Construction Company, Inc.

Dear Mr. Sorenson:

This letter confirms our indebtedness on this agreement as of this
date to be \$98,471.84.

Very truly yours,

Terry R. White
Cost Accountant

TR w/kkf

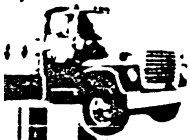


EXHIBIT "B"



Foothill Thrift
1304 Foothill Drive
Salt Lake City, Utah 84108
(801) 581-0405

March 22, 1985

Staker Paving & Const. Co.
1000 West Center St.
No. Salt Lake, Ut. 84054

Dear Sirs,

This Letter is to notify you of the assignment to Foothill Thrift of the Seller's interest in a Real Estate Contract dated July 1, 1977 between Gerald H. Bagley (West Jordan Properties) as Sellers and Staker Paving & Construction Company, Inc., as Buyers.

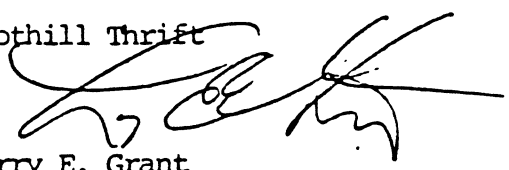
You are hereby notified that all future payments on this contract are to be paid directly to Foothill Thrift, 1304 Foothill Dr. Salt Lake City, Ut. 84108,

We understand that the present balance on said contract is \$98,471.84, with interest paid to 7-9-84. The next payment of \$54,577.06 is due on July 1, 1985.

Any questions regarding this matter should be directed to myself at 581-0405.

Yours very truly,

Foothill Thrift



Larry E. Grant
Executive Vice President

krm

EXHIBIT "E"



STAKER PAVING AND
CONSTRUCTION CO. INC.
A Construction Management Co.
P.O. Box 27598
Salt Lake City, Utah 84127-0598
Telephone
(801) 298 7500



July 26, 1985

Joseph Rust
Attorney at Law
Kessler & Rust
2000 Beneficial Life Tower
Salt Lake City, UT 84111

Dear Joseph:

It was a pleasure to make your acquaintance the other day. As I mentioned at that time, we are concerned about our ability to obtain clear title to property we contracted to buy from Bagley Corporation some time ago. Bagley Corporation has just recently assigned this contract to Foothill Thrift and Loan.

We had hoped to use the monies due to Bagley Corporation under the contract as an offset to monies they owe us, but that option has apparently been eliminated. Our main concern now is assurance that we can obtain clear title upon paying off the contract. Under the terms of the contract, two payments remain; one that was due July 1, of this year, and one that is due in July of 1986. If possible, we would like to maintain the present payment schedule, but would consider paying off the property this year if that is the only way we can have assurance that we will obtain clear title.

I am providing the file on the property for your review and have kept a copy of most of the important documents for myself so we may discuss it at your earliest convenience.

Sincerely,

Marc White
Treasury/Audit Manager

MW/kkf

cc: Bill Fillmore
Val Staker
Larry E. Grant - Foothill Thrift

EXHIBIT "F"



STAKER PAVING AND
CONSTRUCTION CO. INC.
A Construction Management Co.
P.O. Box 27598
Salt Lake City, Utah 84127-0598
Telephone
(801) 295-7500



August 13, 1985

Gerald H. Bagley
d/b/a West Jordan Properties
c/o Bagley and Company
3690 E. Fort Union Blvd. #103
Salt Lake City, UT 84121

RE: Real Estate Contract Between West Jordan Properties and
Staker Paving and Construction

Foothill Thrift & Loan

Gentlemen:

As you are aware, we entered into a contract with Gerald H. Bagley doing business as West Jordan Properties for the purchase of the northeast quarter of Section 27, Township 2 South, Range 2 West, Salt Lake Base and Meridian. That contract was dated July 1, 1977 and provided for payments in the amount of \$54,572.06 on the 1st of July of every year until the contract balance was paid. Under normal amortization schedule, the contract would have paid out fully with a final payment on July 1, 1986.

As you are aware, Mr. Bagley has been accepting contract work which Staker Paving has done for him as offset payments. We have a number of letters in the file which reflect that agreement and the amounts of various the offsets. According to our records, as of January 1, 1985, we had an amount due and owing us by Mr. Bagley in excess of \$110,000.

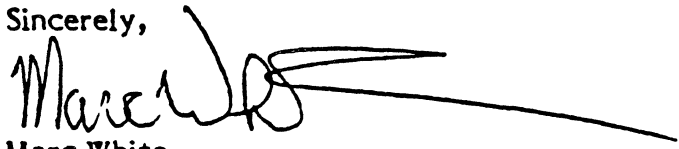
This letter is to inform you that we have elected to offset monies owed us by Mr. Bagley against all monies owed on the referenced contract. According to our calculations, we were entitled to make that offset as early as January 1 of this year. Even assuming, however, an offset as of the date of this letter, the amount of the offset needed to make the remaining payments will be less than \$106,000. Therefore, for the purposes of offset and to avoid any present dispute, we are agreeing to an offset against the amount owed us by Mr. Bagley in the amount of \$106,000, subject to a final determination of the actual amount of that offset.

We note that Foothill Thrift has made itself responsible under that contract by taking an assignment of the contract. It should be noted, however, that we never released West Jordan Properties from its obligations to us on the contract. Therefore, Mr. Bagley remains obligated under all of the terms and conditions, and Foothill Thrift is likewise and equally responsible under all of the terms and conditions.

EXHIBIT "D"

This letter is therefore a demand that we be given a warranty deed and title insurance as provided by the referenced real estate contract. If you fail to deliver the same within ten (10) days of the date of this letter, we shall have no recourse except to bring legal action against you for your failure to perform under the contract.

Sincerely,

A handwritten signature in black ink, appearing to read "Marc White", with a long horizontal flourish extending to the right.

Marc White
Treasury/Audit Manager

kkf

JOSEPH C. RUST (2835)
DOUGLAS E. GRIFFITH (4042)
KESLER & RUST
Attorneys for Plaintiff
2000 Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111
Telephone: (801) 355-9333

EB 17 1986

FILED IN LEWIS P.C

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

STAKER PAVING & CONSTRUCTION	:	PLAINTIFF STAKER PAVING'S
COMPANY, INC., a Utah	:	RESPONSES TO INTERROGATORIES
	:	OF TRACY MORTGAGE COMPANY
Plaintiff,	:	
v.	:	
	:	
GERALD H. BAGLEY, et al.	:	Civil No. C85-7088
	:	
Defendants.	:	(Judge Russon)
	:	
	:	
CLAUDE CURLEY,	:	
	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
TRACY MORTGAGE COMPANY,	:	
	:	
Third-Party Defendant.	:	

Plaintiff Staker Paving and Construction Company, Inc.
(hereinafter "Staker Paving") hereby responds to third-party
defendant Tracy Mortgage Company's Interrogatories as follows:

Interrogatory No. 1: Identify each person with whom
you contend that you entered into a contract for the performance

Response No. 7: The following work was accomplished by Staker Paving on the property.

1. Furnished, placed and compact six inch untreated base course, \$10,976.00.

2. 222,295 square feet, three inch asphalt, 2,058 cu at \$50.00 per cu. \$102,900.00.

3. Concrete work: 172 L.F. curb at \$4.20 per L.F., \$722.40; 51 L.F. waterway at \$15.95 per L.F., \$813.45; 10,741 L.F. curb and gutter at \$4.62 per L.F., \$49,623.42; 28 hours grading at \$49.50 per hour, \$1,386.00.

4. Extras: 1,923.40 tons of road base installed at \$4.54 per ton, \$8,732.24.

The prices quoted above are the contract and change order prices as agreed to between Staker Paving and Bagley and Company. The work began on October 10, 1984 and was concluded on November 15, 1984. Performance of all work and delivery of all items referenced above were completed between those dates. Staker Paving has received payments on this project totalling \$64,553.34.

Interrogatory No. 8: Identify each person having knowledge of the facts stated in your answer to Interrogatory No. 7 and separately with respect to each such person, state the substance of his or her knowledge.

V. DEPOSITION Gerald H. Bagley

STAKER PAVING AND CONSTRUCTION
COMPANY, INC., A UTAH CORPORATION,

VS.

GERALD H. BAGLEY, INDIVIDUALLY,
AND D/B/A WEST JORDAN PROPERTIES
AND D/B/A BAGLEY AND COMPANY, FOOTHILL
THRIFT, MAGNA-GARFIELD EMPLOYEES
THRIFT PLAN, ASSOCIATED TITLE
COMPANY, BAGLEY FAMILY
PARTNERSHIP, CLAUDE CURLEY, UTAH POWER
AND LIGHT COMPANY, G.H. BAGLEY,
INC., ELMER JENSEN AND LOIS JENSEN,

)NO. C85-7088

TAKEN: DECEMBER 19, 1986

Certified Shorthand Reporters •



COPY

OUR FILE NO. 1219-86

INTERMOUNTAIN COURT REPORTERS

REPORTED BY

1 Deposition of GERALD H. BAGLEY, taken on behalf of
2 Plaintiff, at 36 South State Street, Suite 2000,
3 Beneficial Life Tower, Salt Lake City, Utah, on December
4 19, 1986, commencing at 10:00 a.m., before DANA MARIE
5 MORSE, Certified Shorthand Reporter, and Notary Public
6 in and for the State of Utah, Pursuant to Notice.

7
8 APPEARANCES:

9
10
11
12 FOR THE PLAINTIFF: DOUGLAS E. GRIFFITH, ESQ.
13 Kesler and Rust
14 36 South State St., #2000
Salt Lake City, Utah 84111

15 FOR THE DEFENDANT RALPH J. MARSH, ESQ.
16 BAGLEY: Backman, Clark & Marsh
17 800 McIntyre Building
68 South Main Street
Salt Lake City, Utah 84101

18 FOR THE DEFENDANT PAUL W. HESS, ESQ.
19 CURLEY: Strong and Hanni
20 Sixth Floor Boston Building
Salt Lake City, Utah 84111

21 FOR THE DEFENDANT ROSEMARY RICHARDSON, ESQ.
22 UTAH POWER: JOHN M. ERIKSSON, ESQ.
1407 W. North Temple, #339
Salt Lake City, Utah 84116

23 FOR THE DEFENDANT KAY LEWIS, ESQ.
24 FOOTHILL THRIFT: 320 South 300 East
Salt Lake City, Utah 84111

25 ALSO PRESENT: BURTON MAXFIELD

1 negotiated them. I approved it, or I wouldn't have
2 signed it.

3 Q. Do you recall having any conversations with
4 any representatives of Staker Paving in regards to this
5 contract?

6 A. Primarily most of my dealings are with Stew
7 Staker.

8 Q. Do you recall speaking with Stew Staker
9 concerning this particular transaction?

10 A. Not the specific time or place, no.

11 Q. To your knowledge, prior to this transaction,
12 had you ever entered into any sale of real estate to
13 Staker Paving and Construction?

14 A. I didn't understand that.

15 Q. Have you ever prior to this transaction
16 entered into any sale of property to Staker Paving?

17 A. I don't know. I could have been. We sold
18 some of my stuff, but I can't remember any.

19 Q. Do you recall any other dealings with Stew
20 Staker concerning the sale of property?

21 A. No, not to my knowledge. It doesn't mean
22 there wasn't some.

23 Q. Do you recall how payment was to be made on
24 this real estate contract?

25 A. Just the document says \$54,572.06 annual

1 payment on July 1 and each consecutive July 1st
2 thereafter until paid in full.

3 Q. Do you ever recall any other discussions about
4 alternative methods of payment on this real estate
5 contract?

6 A. Not when we bought it. But from time to time
7 -- and I don't remember the specifics, like, did he walk
8 in on September 2nd at 3 o'clock or anything like that.
9 But I know at times when they were doing work for us,
10 Stew would come in and say, we owe you \$54 grand, can we
11 take that out, because you owe us \$54 grand or something
12 like that.

13 And so I do know -- I don't know if it happened
14 more than once or twice, but I do know that at times
15 when we owed them money, at least that somehow or
16 another the payments were offset once in awhile.

17 Q. Okay. When you say when we owed, you're
18 talking about Staker money? Then you, on occasion,
19 would offset payments on this real estate contract; is
20 that correct?

21 A. Well, I think we have done it. I have a
22 recollection of having done that once or twice. I don't
23 know, because they did all our asphalt work. They did
24 millions of dollars worth of asphalt work for us, and so
25 it was kind of a logical thing to do.

1 discussions on offsets being made on this real estate
2 contract were held between you and Stew Staker; is that
3 right?

4 A. Well, I don't recall anybody else that I can
5 even think of their name that it would have been, but
6 Stew.

7 Q. At Staker Paving?

8 A. Yes.

9 Q. Was there anyone else working within your
10 organization that could have talked with Staker Paving
11 about making offsets?

12 A. They would never -- no one had any authority
13 to do anything without checking with me on the trade, so
14 they would have had to come to me.

15 Q. Do you recall any of the persons you worked
16 with within your organization coming to you and talking
17 to you about trading work against this real estate
18 contract?

19 A. Well, it no doubt -- that's no doubt how it
20 happened. Somebody out there told somebody and they
21 came to me and said, would you be interested in
22 offsetting or something. But I don't know -- I can't
23 remember specifically who it would have been.

24 Q. Do you ever recall any discussions between you
25 and Richard Sorenson concerning offsets on this real

1 estate contract?

2 A. Well, he's the accountant that would have
3 figured it out, so he would have been brought into the
4 discussion. But I don't recall any, where I would call
5 him in to say, do we owe them this much and do they owe
6 us this much? And if they want to do it that way, it
7 will work or something, so that's all it would have
8 amounted to.

9 Q. And this process in which offsets were made to
10 this real estate contract, is what you've told me is
11 that you would give the final approval on any of those
12 offsets?

13 A. Yes. No one would ever do that without my
14 approval.

15 Q. And besides G.H. Bagley Ltd., do you know of
16 any other entities that may have had work in which was
17 used to offset against this real estate contract?

18 A. Well, in thinking where we laid asphalt, I
19 can't think of -- it could have been that in repair work
20 or around those condos that there was some done at the
21 racquet club, but I don't know.

22 I can't remember, because we didn't do any other
23 roads that I can think of. Well, we did Garden Valley
24 roads, but I think that was earlier. It was a lot
25 earlier than this. I think that project was finished

1 Q. At the offices of Foothill Thrift?

2 A. Yes.

3 Q. Do you recall who else was with you at the
4 time you had these discussions with Mr. Grant?

5 A. I think Tom Bagley and Richard Sorenson were
6 there.

7 Q. Do you recall if there were any monies still
8 owed under the real estate contract at the time of the
9 assignment?

10 A. I assume there was. There wouldn't have been
11 any reason for assigning it.

12 Q. Do you recall how much?

13 A. No.

14 Q. At the time you made the assignment to
15 Foothill Thrift, did you indicate to them how payments
16 under the contract had been made up to that time?

17 A. No.

18 Q. Do you recall any discussions at the time that
19 you were negotiating or discussing with Larry Grant this
20 assignment indicating to him that part of this contract
21 had been paid by offsetting work performed by Staker?

22 A. No.

23 Q. You don't recall ever mentioning that?

24 A. It wouldn't have been any of his business.

25 Q. Do you recall him ever asking you how payments

1 Q. Do you know what kind of work Staker performed
2 for the second phase of the industrial work?

3 A. Yes. It was asphalt for the roads.

4 Q. Building a road?

5 A. Yes.

6 Q. Which entity would that have been owed to, or
7 which entity's debt would that be?

8 A. I don't know.

9 Q. Do you know which entity was at that time
10 overseeing or performing the work out at the industrial
11 park?

12 A. Well, that portion of the park is not only by
13 Gerald H. Bagley, so I don't know which entity was doing
14 that.

15 Q. It would have been one of these entities
16 you've mentioned here today, though, that you hold an
17 interest in?

18 A. I couldn't say for sure.

19 Q. Do you have any idea how much was owed for the
20 work performed by Staker out at the industrial park at
21 that time?

22 A. No, I don't. There was a big squabble about
23 it, because the work was never approved by West Jordan.
24 So our engineers claim we didn't owe it until it was
25 finished, and so there was a big hassle, because the

1 work was never finished and it's never been approved to
2 date.

3 Q. Turning to the work at the industrial park,
4 what was the first phase of the work being done out
5 there at the industrial park? When did that occur?

6 A. I'd have to get documents out and check dates,
7 because I couldn't say for sure. It was several years
8 before that, before the second phase.

9 Q. Would it have been the late 70's?

10 A. It would have been the early 70's.

11 Q. Do you recall which entity was overseeing the
12 work performed out there?

13 A. Gerald H. Bagley Ltd.

14 Q. To your knowledge, did Staker Paving perform
15 any work on the first phase at the industrial park?

16 A. I thought they did, but I can't remember. I
17 mean, do you think Staker did it?

18 MR. MARSH: I don't know.

19 THE WITNESS: I don't know either. I just kind of
20 assume they did, but I don't know. I'm assuming that
21 they did.

22 BY MR. GRIFFITH:

23 Q. To your knowledge, was any of their work, if
24 they had performed work out there, used to offset this
25 real estate contract?

1 A. They were screaming for it.

2 Q. What people are you talking about were wanting
3 a road on that property?

4 A. Well, without the property, without the road
5 going in there, they wouldn't have bought it. Who would
6 go out in the middle of a field and buy five acres with
7 nothing there and pay \$25 grand an acre for it. Not in
8 your right mind, you wouldn't. So the only thing that
9 made that property worth anything was the road.

10 Q. And so in selling these parcels of property,
11 it was represented that they would have access to a
12 road?

13 A. Yes.

14 Q. Do you know if anyone talked to UP&L about a
15 road crossing their property?

16 A. I don't know.

17 Q. Did you ever have any discussions with any
18 representative of UP&L?

19 A. I'm sure I did.

20 Q. Do you recall who it might have been?

21 A. No, I don't.

22 Q. What is the current status of the road that's
23 been put in out there?

24 A. Well, it's unacceptable to West Jordan, so
25 they won't accept it. So there it sits and they want us

1 to rip it up.

2 Q. Do you know what the reasons are for it being
3 unacceptable?

4 A. It won't pass any of the tests that the
5 engineers put to it.

6 Q. Do you know why it will not pass the tests?

7 A. I've heard them discuss it. It has to do with
8 the depth of the -- the inadequate depth of asphalt,
9 inadequate road base, holes that have developed in it,
10 weak spots. Those guys at West Jordan can sit there for
11 an hour telling you what's wrong with it.

12 Q. What are you currently attempting to do to
13 rectify the situation?

14 A. We're trying to get West Jordan to decide what
15 they will accept and we're trying to get it done to
16 their acceptance. So far it's about \$200,000 what
17 they're quoting us.

18 Q. Are you currently soliciting any bids for
19 asphalt work to complete the road?

20 A. Well, I'm not, but people involved with it
21 are.

22 Q. Who are those people?

23 A. John Quist at Bush and Gudgeon Engineering.

24 MR. MARSH: Quick.

25 THE WITNESS: Quick or is it Quist? It might be

1 John Quick.

2 BY MR. GRIFFITH:

3 Q. What does this engineering firm -- what's
4 their relationship with this road, having this road put
5 in?

6 A. We just hired them is all.

7 Q. They're working for one of your entities?

8 A. Well, I guess you could say that.

9 Q. Which entity?

10 A. I don't know.

11 Q. You say you've hired them, though?

12 A. Well, Tracy Bank who has the mortgage on this
13 will pay for this, if we can ever get it settled, what
14 the city wants and what it costs. And so through Tracy
15 Collins, they have authorized us to hire John Quick at
16 Bush and Gudgell. And they're doing the work trying to
17 get an agreement out of West Jordan of what they'll
18 accept. West Jordan wants the whole thing ripped up and
19 they're trying to convince them it's not quite
20 necessary.

21 Q. Tracy Collins holds the mortgage on this
22 property?

23 A. To my knowledge, yes.

24 Q. The mortgage on which you or one of your
25 entities are liable?

1 represent Foothill Thrift.

2 A. Foothill Thrift.

3 Q. Right. You have before you Exhibit 4
4 previously identified by yourself as the assignment of
5 contract. It's true, is it not, that at the time the
6 assignment was made, you, in fact, claimed that Staker
7 Paving owed to you the \$98,471.84 due on that contract
8 at that time; is that correct?

9 A. Yes.

10 Q. Now, isn't it also true that at the time the
11 assignment was made that you had not authorized any
12 offsets that would have reduced that figure?

13 A. Not to my knowledge.

14 Q. During the time that the contract was assigned
15 to Foothill Thrift, isn't it also true that you did not
16 authorize any offsets against the balance on that
17 contract?

18 A. That's true.

19 Q. At the time that you entered into the
20 assignment you, in fact, received consideration
21 therefore and borrowed money from Foothill Thrift; isn't
22 that correct?

23 A. That's correct.

24 Q. And you utilized that money for whatever
25 business purposes you deemed to be in your best

1 A. Now, state it again. I'm trying to be correct
2 in my answer.

3 Q. All right. At the time you pledged the
4 contract to Foothill Thrift, that would have been July
5 1st, or excuse me, the 12th day of March of 1985.

6 A. Okay.

7 Q. Isn't it true that all offsets that you had
8 authorized had been given credit on the contract to
9 Staker prior to that date?

10 A. To my knowledge, yes, that's true.

11 Q. And so at the time this was pledged, they did,
12 in fact, owe the \$98,000 and to your knowledge, they
13 still owe on that less any payments they may have made?

14 A. That's correct.

15 MR. LEWIS: Thank you. One other question. Excuse
16 me.

17 Q. And you did not -- and this is probably
18 redundant, but I think it was your testimony that no one
19 else in your organization had authority to grant offsets
20 without your specific permission?

21 A. That's correct.

22 MR. HESS: Is it my turn now?

23 (Whereupon Exhibit No. 5 was
24 marked for identification.)

25

1 A. I'd have a map in my office showing which one,
2 but I don't remember which one it is.

3 Q. I believe you testified earlier, Dr. Bagley,
4 that the road that is this darkened portion on Exhibit 3
5 crosses various parcels of property here.

6 A. What do you mean crosses?

7 Q. Well, that's what I want to ask you. What did
8 you mean by that? Does this road actually cross
9 property that you sold to other folks, or did you
10 dedicate this road? Let me ask that question first. Is
11 this a dedicated road?

12 A. I'd have to ask my attorney.

13 MR. MARSH: To my knowledge, it is, but I'm not
14 absolutely certain of that.

15 BY MR. HESS:

16 Q. You indicated that you have run into some
17 problems with West Jordan. Is West Jordan insisting
18 that certain work be done before the road will be
19 accepted as a dedicated road?

20 A. Yes. Accepted by them as a -- when they
21 accept it, then they have to accept, then they take care
22 of the maintenance, but they won't accept it until it
23 reaches their standards. And so the road to date hasn't
24 been accepted, but somebody has done a legal description
25 of that road. And that road is -- the engineers had to

1 have that, where they'd do it, so there's some
2 engineers' descriptions of the land with all that stuff.

3 Q. Now, on Exhibit No. 5, the one I just handed
4 you, the seller is shown to be Bagley Family
5 Partnership.

6 A. Okay.

7 Q. You testified earlier that this property on
8 the map was owned by West Jordan Properties, I believe.
9 Do you know --

10 A. Not this property. The other property in the
11 industrial park.

12 Q. Okay.

13 A. This is West Jordan Properties, but not --

14 MR. MARSH: West Jordan Properties owned the
15 property that was sold.

16 THE WITNESS: Oh, did it?

17 MR. MARSH: To Staker on this contract, Exhibit 1.
18 Not this property.

19 BY MR. HESS:

20 Q. Okay. Do you know how much of this property
21 was owned by Bagley Family Partnership as of January 18,
22 1980?

23 A. How much of this?

24 Q. How much of the property in Exhibit 3.

25 A. No, I don't.

1 Q. But it's possible no contact was made?

2 A. No, I don't think it's possible. I'd be
3 shocked if no contact was made.

4 Q. But you're having difficulty producing
5 evidence that contact was made and with whom.

6 A. Well, we probably got about ten rooms of
7 records so nobody has asked me to go pull one little
8 piece of paper out of all that stuff.

9 Q. So here I am asking you to do that.

10 A. Yes. It might take awhile.

11 MS. RICHARDSON: Thank you. That's all I have.

12 FURTHER EXAMINATION

13 BY MR. GRIFFITH:

14 Q. Mr. Bagley, I have just got some follow-up
15 questions. The assignment that is shown as Exhibit 4 of
16 the Staker real estate contract to Foothill Thrift, was
17 that assignment made as collateral for a loan?

18 A. I don't know.

19 Q. You don't have any refreshed recollection as
20 to what the purpose of the assignment was?

21 A. I mean, not that I could tell you for sure.

22 Q. Was the assignment made on any conditions that
23 Foothill Thrift would collect the monies represented to
24 be owed by -- represented on the document to be owed by
25 Staker to Bagley upon a default or some other condition?

1 A. Why else would they take it? I assume if they
2 took an assignment that if some project went bad, they
3 had the right to go collect the money. I mean, I don't
4 know. That's the only reason I'd assume they'd want
5 it. Why would they want it?

6 Q. Do you know what project or which entity was
7 first and foremost liable on the loan for which this
8 assignment was collateralized?

9 A. Well, they probably -- if they got my name on
10 it, why they'd come back to me through one entity or
11 another anyway.

12 Q. Have they ever attempted to collect any
13 monies, Foothill Thrift, ever attempt to collect any
14 monies from you or any of your entities for loans that
15 have gone unpaid?

16 A. I think they must have.

17 Q. Do you know which entities that would be
18 involved in that?

19 A. No, I don't.

20 Q. Would Mr. Sorenson know?

21 A. Yes, Mr. Sorenson would know.

22 Q. Did you have any legal counsel involved with
23 you at the time you negotiated this assignment with
24 Foothill Thrift?

25 A. I don't know.

VI. DEPOSITION Thomas G. Bagley

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

* * *

STAKER PAVING AND CONSTRUCTION -
COMPANY, INC., a Utah
corporation,

Plaintiff,

vs.

GERALD H. BAGLEY, individually
and d/b/a WEST JORDAN
PROPERTIES and d/b/a BAGLEY
& COMPANY, FOOTHILL THRIFT,
MAGNA-GARFIELD EMPLOYEES THRIFT:
PLAN, ASSOCIATED TITLE COMPANY,
BAGLEY FAMILY PARTNERSHIP,
CLAUDE CURLEY, UTAH POWER &
LIGHT COMPANY, G.H. BAGLEY,
INC., ELMER JENSEN AND LOIS
JENSEN,

Defendants.

: Deposition of:

: THOMAS G. BAGLEY

: Civil No. C85-7088

COPY

BE IT REMEMBERED that on the 10th day of June,
1987, the deposition of THOMAS G. BAGLEY, produced as a
witness herein at the instance of the plaintiff herein, in
the above-entitled action now pending in the above-named
court, was taken before Carolyn Erickson, a Certified
Shorthand Reporter and Notary Public in and for the State of
Utah, holding Utah CSR License Number 142, commencing at the
hour of 1:30 p.m. of said date at the offices of Kesler &
Rust, 2000 Beneficial Life Tower, Salt Lake City, Utah 84111

CAROLYN ERICKSON
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* * *

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1 went to my father or anything like that. It was much less
2 formal than that.

3 Q Do you ever remember an occasion where Bagley or
4 any of its entities owed money to Staker, and Staker made a
5 proposal that such monies, rather than being paid by
6 Bagley, be off-set on the real estate contract? Was there
7 ever an occasion where you disagreed with taking that
8 option of off-setting rather than paying Stakers cash?

9 A I would think there possibly was one or more
10 occasions where an off-set proposal was made that either we
11 or Staker didn't agree to. I don't recall any specific
12 instances but I recall in general that there were probably
13 either proposals from us, "Let's off-set this", or
14 proposals from us or from Staker that said "Let us off-set
15 this", and we say, "No, we pay or you pay." I know that
16 there were times when we agreed to off-set and there were
17 other times when we did not agree, either one side or both,
18 to the off-set. It was really just on a case-by-case basis
19 or year-by-year.

20 Q Can you tell me, if there were such occasions can
21 you tell me why Bagley would be interested in making a cash
22 payment to Staker Paving rather than accept an off-set on
23 the real estate contract?

24 A There might have been occasions which I think
25 there probably were, for example, on the Jeremy Ranch for

1 A For some of the entities, yes. Normally, if we
2 had the ability to pay our bills, we paid them. We didn't
3 make a practice of trying to avoid paying bills if we had
4 the ability to do it.

5 Q So had you been able to pay it, you would have
6 paid it?

7 A I assume so. But I don't recall the
8 circumstances surrounding this particular bill. There may
9 have been questions on whether it was accurate. There may
10 have been questions on whether the money was actually owed.
11 There may have been questions on the quality of work.
12 There could have been a lot of different reasons why, even
13 if Bagley had the ability to pay that they may not have
14 paid.

15 Q But you are not acquainted with any of those
16 reasons?

17 A Not specifically but in working with contractors
18 there were often problems.

19 Q But as to this invoice, you are not acquainted
20 with any reason why?

21 A I am not acquainted with the invoice directly.
22 Like I say, I don't recall ever seeing this invoice, but as
23 a general rule, we dealt with contractors for many years,
24 and they always liked to be paid within five days of billing
25 us and many times there was work that was either not done

1 properly or not completed properly and so forth and we
2 always had to make sure that before we made our payments
3 that the work was done according to the way it was supposed
4 to be done. So what I am saying is that it is possible that
5 we had the funds available but for some reason or another
6 the work wasn't done properly or it wasn't completed and
7 therefore payment wasn't made.

8 Q But all of that is speculation, is it not?

9 A Well, a lot of what I am telling you is
10 speculation.

11 Q You don't have any specific knowledge as to work
12 that was being done out at the Industrial Park #2 by
13 Staker, do you?

14 A I didn't go out there and check up on the
15 different contractors doing work out there.

16 Q So you don't know whether or not Staker's work was
17 completed at this point in time?

18 A No, I don't for sure. Like I say, I didn't
19 supervise on a day-to-day basis any of the contractors type
20 work being done on any of the different projects.

21 Q Regarding this Industrial Park #2, were you at all
22 involved in the selling of, say, any of the properties out
23 there to various individuals or entities?

24 A On an indirect basis.

25 Q Did you negotiate any of the contracts with any of

1 MR. MARTIN: Just a couple, Mr. Bagley.

2 EXAMINATION

3 BY MR. MARTIN:

4 Q I am trying to stretch your recollection of the
5 events that took place a number of years ago. With respect
6 to trade-payments--

7 A Who are you representing, just so I will know?

8 MR. MARTIN: My name is Mel Martin and I
9 represent Foothill Thrift and Loan.

10 THE WITNESS: Okay.

11 Q (By Mr. Martin): With respect to the trade
12 payments that may have been exchanged between Staker and
13 the Bagley entities, did you ever think or feel that you
14 had a legal, ethical, or moral obligation to accept trade-
15 payments in lieu of cash payments for those real estate
16 contract payments?

17 A No.

18 MR. GRIFFITH: Are you asking him for his legal
19 opinion here, or do you want his state of mind?

20 MR. MARTIN: I asked him if he had any obligation
21 whatsoever, whether it be legal, ethical, or moral to accept
22 trade-payments in lieu of cash payments and if I understood
23 his answer correctly, it was no, there was no obligation or
24 you felt that you had no obligation.

25 THE WITNESS: Not other than when we agreed on a

VII. DEPOSITION Richard L. Sorensen

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY
STATE OF UTAH

* * *

STAKER PAVING AND CONSTRUCTION :
COMPANY, INC., a Utah :
corporation, :
: Deposition of:
Plaintiff, :
: RICHARD L. SORENSEN
vs. :
: Civil No. C85-7088
GERALD H. BAGLEY, individually :
and d/b/a WEST JORDAN :
PROPERTIES and d/b/a BAGLEY :
& COMPANY, FOOTHILL THRIFT, :
MAGNA-GARFIELD EMPLOYEES THRIFT: :
PLAN, ASSOCIATED TITLE COMPANY,:
BAGLEY FAMILY PARTNERSHIP, :
CLAUDE CURLEY, UTAH POWER & :
LIGHT COMPANY, G.H. BAGLEY, :
INC., ELMER JENSEN AND LOIS :
JENSEN, :
Defendants.

COPY

BE IT REMEMBERED that on the 10th day of June,
1987, the deposition of RICHARD L. SORENSEN, produced as a
witness herein at the instance of the plaintiff herein, in
the above-entitled action now pending in the above-named
court, was taken before Carolyn Erickson, a Certified
Shorthand Reporter and Notary Public in and for the State of
Utah, holding Utah CSR License Number 142, commencing at the
hour of 9:30 a.m. of said date at the offices of Kesler &
Rust, 2000 Beneficial Life Tower, Salt Lake City, Utah 84111

CAROLYN ERICKSON
Certified Shorthand Reporter
License No. 142
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* * *

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1 be an industrial park. They wouldn't zone it for anything
2 else. So that became known as the West Jordan Industrial
3 Park.

4 Q Would it be correct to say that Gerald Bagley,
5 from the time that you came to be employed by him or during
6 the period of time that you were employed by him, was in the
7 work of developing properties?

8 A Yes, I think so, yes. He wasn't practicing his
9 optometry profession at all, that's true.

10 Q So he, and all of his entities, were essentially
11 functioning as a developer?

12 A That's correct.

13 Q During the time that you were there, was it
14 unusual for Dr. Bagley to, when selling properties, to take
15 a construction company or a contractor to accept set-offs or
16 off-sets, whatever you want to call it, for payments on real
17 estate contracts?

18 A Well, the only contractor that we actually off-set
19 work for was Staker Paving. We did trade some with Harper
20 Excavating. We did trade, occasionally, with other people
21 when it was mutually acceptable. Like any developer,
22 Dr. Bagley always experienced cashflow problems, and when a
23 trade could occur that was mutually beneficial, yes, it did
24 happen.

25 Q So it was obviously in Dr. Bagley's and his

1 entities' interest to try and trade when possible?

2 A When possible, yes. It depended on the terms.
3 There were times when we proposed trades to people and the
4 terms of the trade were too stiff. Normally when
5 contractors wanted to trade, they traded at a higher price
6 because they weren't getting cash and it was much more
7 difficult to control the work that was done, and so it was
8 not done very often.

9 Q I take it then that when it was feasible,
10 Dr. Bagley and his entities attempted to work out a trade
11 with real estate purchases?

12 A Well, we didn't discourage it. I don't know if we
13 tried to do it all of the time, but we didn't discourage it
14 if it was beneficial to both sides.

15 Q I realize that you didn't come to work for him
16 until 1978, but to your knowledge prior to July 1st, 1977,
17 the date of the purchase of the real estate by Staker
18 Paving, to your knowledge had Staker Paving ever done any
19 other work for Dr. Bagley, or any of his entities, prior to
20 that time?

21 A I couldn't answer that accurately. I wouldn't
22 know. I know they had a relationship, but I don't know.

23 Q In the purchase of the real estate by Staker
24 Paving from West Jordan Properties, did you know who was
25 involved in the negotiation of that contract?

1 know exactly how many. I know, at the time we negotiated in
2 1980 or 1981, whenever that was, I believe there was
3 actually two years of payments that were taken care of at
4 that time. I think the next year a portion was traded, but
5 not all. I don't remember, I think the next year it was
6 actually just paid.

7 Q In general, do you remember whether there were
8 more trade payments than cash payments under this contract
9 or vice-versa?

10 A If I had to guess, I would say that they were
11 probably about equal, but I wouldn't know without
12 researching.

13 Q How were the trade payments negotiated?

14 A Normally when it came time for a payment from one
15 side to the other, whether they owed us or we owed them, we
16 would sit down and say, "Do you want to work a trade, or
17 not?"

18 Q Who is "we?"

19 A Well, I don't know, sometimes it would be me
20 talking with their controller or with Stu Staker, or
21 sometimes it would be Stu Staker with our engineer. He
22 would come in and ask me "Do you want to trade?", or he
23 would ask me what our position was. But if it was a
24 situation when money needed to change hands, we would then
25 sit down and make a decision whether or not we wanted to

1 trade or not.

2 Q Did you have authority to accept or authorize
3 trades against a real estate contract from Dr. Bagley?

4 A I think that, not unilaterally, no. I think
5 probably with some authority to say that we would accept or
6 not, based upon our position, but normally I would tell him
7 what we were doing to get his approval.

8 Q Were there ever any occasions when you went to him
9 requesting approval for a trade that he did not accept the
10 trade?

11 A Normally he asked me my recommendation and if I
12 recommended that we trade, he went along with that. So I
13 think that we understood where we were, and if it was
14 beneficial and I thought it was beneficial and told him
15 that, I don't remember any time that he said, "No, we are
16 not going to trade."

17 Q You don't remember an occasion where he went
18 against your recommendation?

19 A That's right.

20 Q Do you remember who at Staker Paving you would
21 discuss the trade with?

22 A I can remember discussing trades with their
23 accounting people. I don't remember all of their names. I
24 remember discussing it with Stu Staker on occasion.

25 Q Do you know what Stu Staker's position is there at

1 Staker Paving?

2 A I don't know. I assume he had some authority
3 because he was usually the one that was in our office the
4 most.

5 Q Did you ever meet Stu Staker?

6 A Yes.

7 Q Can you describe him to me?

8 A He is an older man, I had several talks with Stu.

9 Q Over 50?

10 A Yes.

11 Q Over 60?

12 A I don't know if he is over 60, he could be. He
13 could be now.

14 (Marked for Deposition Exhibit 8--Staker Ledger Sheet)

15 Q (By Mr. Griffith): Mr. Sorensen, could you
16 identify for us what has been marked as Exhibit 8?

17 A This was our ledger sheet that was kept recording
18 the payments and the balance owing on the contract.

19 Q This was a ledger sheet kept by Bagley and
20 Company?

21 A Yes.

22 Q Or by Bagley and any of his entities?

23 A Right, actually by West-Jordan Properties

24 Q Do you know who prepared it?

25 A This is my writing. It is probably a recap of

1 older sheets because I was not employed during the first
2 part.

3 Q Let's look at the first payment which appears to
4 be a cash payment made November 3rd, 1977.

5 A That's correct.

6 Q That is prior to your employment with Bagley;
7 correct?

8 A Yes.

9 Q Do you know anything about this particular
10 payment?

11 A I don't know.

12 Q The second payment appears to be a trade payment;
13 is that correct?

14 A Yes.

15 Q And it references an invoice number. Do you know
16 whose invoice that is?

17 A I would assume that that is Staker Paving's
18 invoice to us, to Bagley.

19 Q Would that have occurred at the time when you were
20 employed by Dr. Bagley?

21 A Yes.

22 Q Does that refresh your recollection as to when the
23 first trade was made?

24 A I believe what happened here was actually in about
25 October of 1980 we went back and accumulated, at that time,

1 all of the balances that were owing various Staker entities,
2 because I think, the concrete payment actually was to a
3 different company than Staker, but one that they controlled.
4 It was at that point in time that we sat down and said
5 "Let's take the total of all of these invoices and trade, on
6 the date that they were billed." So we went back on the day
7 that they were billed, for example, the first invoice was
8 billed on April 9 of 1979, although we were negotiating the
9 payment in 1980. We went back and I think this was the one
10 I mentioned earlier where we had traded approximately two
11 years worth because the next payment came in 1982. So it
12 could have been that we actually took care of the 1979, the
13 1980, and 1981 payment in those trades.

14 Q So from November 3rd, 1977, when the first cash
15 payment was made, until that date when you went back and
16 reconciled and accounted for all of the other payments, no
17 actually payments had been made?

18 A That's correct. As I remember what happened was
19 as the work was being done by Staker and as payments came
20 due on the contract, we mutually agreed that at some point
21 in time we would sit down and off-set against either trade
22 checks or whatever we decided to do. That is what we
23 finally did in 1980 was we sat down and went over all of the
24 invoices, all of the work had been accepted, calculated, the
25 amount that was owed on the contract to West Jordan

1 Properties and then worked an off-set on our books and on
2 their books.

3 Q Now, were there particular entities that Dr.
4 Bagley had formed that were entitled to off-set, and others
5 which were not entitled to offset against this contract?

6 A No, I don't believe so.

7 Q It didn't really make a difference which entity it
8 was?

9 A That's correct.

10 Q So when payments came due under the contract and
11 I don't know if you recall when that was, do you recall when
12 the contract required payments?

13 A It says here July 1st, I believe that is when it
14 was.

15 Q For July 1st, 1978; July 1st, 1979, and July 1st,
16 1980, you didn't make an actual reconciliation or
17 acknowledgement of the payment on those dates?

18 A No, we didn't. What we did is we went back, and
19 it was by agreement, we went back and as the invoices were
20 made, the date the invoices were prepared was the date that
21 we counted as payment being made. So, for example, the
22 invoice is dated April 9th, 1979 and on that day we agreed
23 to accept it as being paid because of the trade.

24 Q To your recollection, do you know what the second
25 trade down, invoice #13213, are you acquainted with what

1 that invoice related to, what work it goes to?

2 A No, I'm not. I know that it all dealt with
3 asphalt and concrete work, at least to my knowledge.

4 (Marked for Deposition Exhibit 9 - Invoice #13213)

5 Q (BY MR. GRIFFITH): I show you what has been
6 marked as Exhibit 9. It appears to be a Staker invoice,
7 Staker Paving and Construction invoice, invoice #13213,
8 dated July 31, 1979.

9 On that invoice there is a job name and site. What is
10 that?

11 A It says West Jordan Industrial Park, 7200 South
12 5900 West.

13 Q At this particular point in time in July of 1979
14 do you recall, were you developing the West Jordan
15 Industrial Park or a portion of it?

16 A There was always work being done out there and I
17 wasn't that familiar with it. I didn't get that involved
18 with the actual construction that was being done and the
19 different projects, so I don't know exactly what this
20 relates to.

21 Q But work was being done out there at the West
22 Jordan Industrial Park at this time?

23 A Yes, there would have been.

24 Q And this does appear, does it not, to have been
25 off-set against the contract?

1 A Yes, it was.

2 (Marked for Deposition Exhibit 10 - A Staker letter
3 dated February 5, 1980, to Mr. Richard Sorensen)

4 Q (BY MR. GRIFFITH): I show you what has been
5 marked as Exhibit 10, and it appears to be a letter on
6 Staker Paving letterhead to Richard Sorensen from Arlo W.
7 Anderson, controller at Staker Paving.

8 Do you recognize this letter?

9 A Yes, I do. This was during this period of time
10 that we were negotiating settlement on all of these
11 contracts.

12 Q I believe your previous testimony was that you
13 thought it would have been October of 1980. Does this
14 refresh your recollection as to when this occurred?

15 A Yes, I know that we continued on, so I think what
16 we did is, we did this and then we obviously carried that on
17 with the other trades that were possibly already in place,
18 but I don't know.

19 Q But there is no reason to doubt that is an
20 accurate date that you received that letter, sometime around
21 February 5th, 1980?

22 A I believe so.

23 Q And this letter discusses the reconciliation of
24 the payments to date?

25 A Yes.

1 Q This third page of that letter is an accounting
2 statement which reconciles the amount at that time due and
3 owing down to \$305,577.09. To your recollection were you in
4 agreement with that summary?

5 A Yes.. Well, the actual principle balance was
6 \$295,277.69 and I think our balance, I think is reflected
7 on that sheet in the last column. I think it is pretty
8 close.

9 Yes, it is on the left column on Exhibit 8, which is
10 the ledger sheet. You notice that it just about matches our
11 balance there within a dollar.

12 Q That is on line 5?

13 A Yes.

14 Q Once you reconciled this account on February 5th,
15 1980, did you continue then to communication back and forth
16 with Staker Paving on a regular basis to reconcile the
17 account?

18 A Yes. There was work that went on during this
19 period of time as well that they were paid a significant
20 amount of cash on, so we had ongoing relationship with
21 Staker. This is not the sum total of the work that Staker
22 did for us during that period of time. We had a good
23 relationship with Staker.

24 Q So they were receiving cash payments for their
25 work as well as off-setting this real estate contract?

1 A That's correct. As a matter of fact, there was
2 one time that I wanted to trade very badly and they wouldn't
3 trade because there was money that was owed on the Jeremy
4 Ranch project, and I wanted to off-set it against the
5 contract because our construction draws were coming very
6 slow and they were demanding money and finally I had, we
7 worked out a situation where I had to pay anywhere from
8 \$5,000 to \$10,000 a week and they would come in every week
9 and pick up the check. When they came I asked them if there
10 wasn't a way we could off-set this on the contract and they
11 said no. So there were payments made regularly and that was
12 a great deal of stress for me to have to, every week scrape
13 up \$10,000 to give them.

14 Q When trade payments were made, how did you
15 document those trade payments on your records?

16 A Usually, I believe we had a file with all of the
17 invoices in it, and we would just put it on the ledger as
18 paid. I don't know if we would also send a letter out or
19 they would send us a letter, but there was a lot of
20 communication like this where we agreed upon what the
21 balance was and what was being done trade-wise and what
22 wasn't.

23 Q Do you know if any of those ledger sheets still
24 exist?

25 A The old ones you mean? They might. I doubt it

1 because we have tried to go through and clean up the records
2 and I'm sure that this is when this was prepared and they
3 wouldn't show anything different then this.

4 Q This ledger sheet, Exhibit 8, then to the best of
5 your knowledge, is an accurate accounting of this amount?

6 A That's correct.

7 (Marked for Deposition Exhibit 11 - A Letter on
8 Staker Letterhead Dated July 31, 1980 to Bagley and Company)

9 Q (BY MR. GRIFFITH): I show you what has been
10 marked as Exhibit 11 and it is a collection of four
11 different letters, all on the Staker Paving letterhead and
12 all addressed to Bagley and Company, Attention: Richard
13 Sorensen and all of them from a W.S. Ronne. Do you
14 recognize these letters?

15 A Yes, I do.

16 Q And do these letters appear to account for various
17 off-sets that were going to be taken against the contracts?

18 A That's correct. However, this was not the
19 communication of the off-sets that we had talked about with
20 them and it was in the form of a document of what we were
21 doing.

22 Q Just to understand the procedure, when an off-set
23 trade payment or an off-set would be taken would they
24 initially communicate that by telephone or would you
25 typically receive that in a written communication?

1 A It was usually either done by telephone or by Stu
2 Staker in person when he was in our office. I mentioned he
3 was in our office regularly. Sometimes it was communicated
4 through our engineer who Stu worked very closely with and
5 he would ask him to talk to us and see if we wanted to trade
6 or how we wanted to work it. I would either call them or
7 they would call me.

8 Q Were there typically any time deadlines on when a
9 trade payment could be accepted or requested?

10 A Normally they seemed to occur about the time that
11 payments were due, was when we would usually discuss them,
12 what we were going to do for this year's payment, whether it
13 was going to be a trade or whether it was cash.

14 Q When you say payments were due, are you talking
15 about the payments due under the real estate contract?

16 A Well, both ways, when payments became due to them
17 for work that they had performed or when payments came due
18 under the real estate contract. So it was something that we
19 discussed regularly.

20 Q When payments were due under the Staking invoices,
21 that is, payments from Bagley and Company or any of his
22 entities, due to Staker, the invoices stated that payments
23 are typically due within 20 or 30 days of the date of the
24 invoice. Were communications typically made within that
25 period of time or would they go beyond the due date due

1 under the invoice?

2 A Well, they were done at different times. Some
3 were done even before the work was performed. We needed
4 work done and we could ask for a bid with the understanding
5 that it would be trade work and others, quite often Stu
6 himself would bring the bills in, the invoices, and at that
7 point in time we would talk about whether these were trade
8 or not trades and some could have even run over the 30 days,
9 I don't know. I don't remember.

10 Q So there wasn't any set procedure as to when
11 trades could be taken?

12 A No.

13 Q Do you ever remember on occasion discussing
14 whether interest would be charged to Bagley and Company for
15 not executing a trade payment earlier, closer to the invoice
16 date?

17 A I don't recall any conversations about that, no.
18 I don't think we ever did. We could have, but I don't
19 recall that we did.

20 Q You don't recall ever being charged interest?

21 A It could be that there is interest on these
22 invoices, but I don't know.

23 Q When a trade would be done, would it typically be
24 followed up by a letter similar to these in Exhibit 11?

25 A I think in most instances they were.

1 Q Were there ever occasions when you followed up on
2 a trade payment with a letter or was it typically Staker
3 Paving?

4 A I could have easily written them at the same time.
5 I don't remember. I don't recall if I did or not.

6 Q You don't recall ever doing that?

7 A No.

8 Q Do you know if any of the files currently with
9 documents retained by Mr. Bagley and his entities will
10 contain any such letters if they existed?

11 A I would seriously doubt it. We wrote a
12 significant amount of correspondence out of the office and
13 I believe that most of them have been discarded.

14 Q I believe if you take the accounting of your
15 ledger sheet, there are ten trade payments made over the
16 course of this contract and four cash payments. Did you
17 receive Dr. Bagley's authorization on all ten of those trade
18 payments, to your recollection?

19 A I don't know if I specifically went and sat down
20 on each one of them. I believe that at some point in time I
21 made him aware of what I thought we should do and asked his
22 approval and I believe he said yes.

23 Q He was aware then that Staker Paving was off-
24 setting its real estate contract with the trade payments?

25 A I believe so.

1 Q On a fairly regular basis?

2 A I don't know if he felt it was regular or not. He
3 did not make a practice to stay very close to the actual
4 accounting.

5 Q Who was it that would be involved in seeking out
6 Staker to do work for Dr. Bagley's entities?

7 A Primarily I believe it was Mike Alldredge, who was
8 our engineer at the time, that dealt with Staker. He had a
9 son-in-law that worked for us named Dee Halverson who was
10 also a contractor and the two of them would generally have
11 contacted Staker to bid. Most of the communication that
12 actually took place between our office and Staker's office
13 was between the engineer, Mike Alldredge, and Stu Staker. I
14 met their accounting people and talked to them for these
15 purposes, but other than that there wasn't that much
16 communication between us.

17 Q Were the engineers that worked for Dr. Bagley
18 aware that they had the option to take an off-set on
19 Staker's work?

20 A Mike Alldredge was aware, yes.

21 Q So that in negotiating on particular jobs they had
22 the ability to discuss with Staker taking off-sets against
23 the real estate contract?

24 A Right. I think that oftentimes, as we bid jobs,
25 that was discussed up front, whether or not it would be a

1 trade or whether it would be a cash job.

2 Q To your knowledge, did Mr. Alldredge as the
3 engineer have to go talk to Dr. Bagley to seek his approval
4 prior to negotiating these types of arrangements with
5 Staker?

6 A I think primarily what he would do is negotiate it
7 and then go ask Dr. Bagley if he approved and if he
8 approved then they would go ahead.

9 Q To your knowledge, was there ever an occasion that
10 Dr. Bagley did not approve of taking trade with Staker?

11 A No, I don't know of any time.

12 Q I think I would like to refer you to the two final
13 cash payments there that are noted here on your ledger
14 sheet. Do you remember the circumstances surrounding either
15 of those cash payments?

16 A I don't now.

17 Q With regard at least to the last one dated 7-1 of
18 1984 in which the annual payment was made in cash, do you
19 remember contacting Staker Paving and requesting
20 specifically that they make that payment in cash rather than
21 take a trade?

22 A I could have, I don't recall doing that.

23 Q Are you acquainted with an individual at Staker
24 Paving known as Bill Fillmore?

25 A Yes, I have met him.

1 Q Did you ever have any discussions with him?

2 A Yes. As a matter of fact, now that you bring his
3 name up, I believe actually, it was probably this payment
4 because there was one payment that I went out and talked
5 with Bill and Stu--no it was not Stu, Val Staker about the
6 payment out at their offices and it was very probably this
7 last payment.

8 Q What was the gist of your conversation with them
9 on going out there?

10 A Just that we needed the cash, that we wanted to
11 take the payment.

12 Q In cash rather than in trade?

13 A Yes.

14 Q Did they want to take the payment in trade?

15 A They very well may have wanted to. I don't
16 remember what the circumstances were. I don't think at the
17 time that we had any outstanding invoices.

18 Q Do you know if, at the time Staker was doing any
19 work for Bagley or any of his entities?

20 A They were probably doing work at the Jeremy Rancy,
21 but I am not aware of that because there was work done every
22 year there.

23 Q Do you know if they were under contract to do any
24 other work besides Jeremy?

25 A I don't know if they were or not. I wasn't very

1 this ledger sheet?

2 A It could very well have been when we sold the
3 contract to Foothill that it was done for them.

4 Q Do you recall specifically doing it in connection
5 with that assignment?

6 A I don't recall if I did it then, but it very well
7 could have been.

8 Q Do you recall who has seen this? Do you recall
9 whether Foothill Thrift had seen this ledger sheet?

10 A I'm sure I gave them a copy of the ledger sheet as
11 part of the sell.

12 Q Would that have been Larry Grant?

13 A Probably.

14 Q The last line under "cash payment" refers to an
15 adjustment. What is that?

16 A When I talked with--I can't remember who it was at
17 Staker, when I was confirming our balance with him, he had a
18 difference, it was actually in our favor, and so I adjusted
19 ours to agree with theirs.

20 Q Do you how it was that you spoke to that person at
21 Stakers?

22 A I don't.

23 Q Was it over the telephone?

24 A Yes, I believe so.

25 Q And you don't recall who it was?

1 Q (By Mr. Griffith): You have had an opportunity to
2 look at Exhibit 12. Do you ever remember seeing this
3 document before?

4 A No, I don't. That doesn't mean I haven't.

5 Q Is there any reason that you would not have seen
6 this particular invoice or that it could not have been
7 given to you?

8 A It very easily could have been.

9 Q Could that have been given to you?

10 A Yes.

11 Q In the operations at Bagley you would have
12 ultimately been the one to receive this invoice; is that
13 correct?

14 A That's correct.

15 Q Do you recall any discussions with Dr. Bagley or
16 anyone at Staker regarding the payment of this balance on
17 this particular work at the Industrial Park?

18 A I don't, no.

19 Q I believe, although it is hard to see, payment was
20 due December 31, 1984, twenty days following the date of the
21 invoice. Do you recall ever being told that this
22 payment would be off-set on the real estate contract?

23 A No; I don't. I really do not ever remember
24 discussing it with anyone. The date of this invoice is
25 right around the time that Dr. Bagley was losing control of

1 Q In essence, by replacing him as the general
2 partner, didn't they, in essence, take control from him?

3 A They did take control from him, however, as I
4 mentioned at first, he was on the Board of Directors and was
5 the major spokesman on the Board of Directors. There was
6 six directors on the board but every other director were
7 all representatives of the lending institutions, which were
8 all back east, virtually knew very little about the project
9 and as a result he controlled the board until such time as
10 they asked him to be removed.

11 Q At this point in time was Dr. Bagley and his
12 entities having some serious cash flow problems?

13 A As a result of the Jeremy, yes, we were because
14 prior to this time most of the cash, a lot of the cash that
15 supported his other operations came from the Jeremy.

16 When the Jeremy was first started as an entity, it
17 required a great deal of cash that Dr. Bagley borrowed from
18 a lot of his other entities and at this point in time the
19 Jeremy was repaying those debts. So the Jeremy Limited was
20 a great source of cash flow.

21 (Marked for Deposition Exhibit 16 - Staker
22 Letter Dated February 14, 1985)

23 Q (By Mr. Griffith): I show you what has been
24 marked as Exhibit 16 and ask if you have ever seen this
25 document before?

1 A Yes, I have.

2 Q And will you identify it for the record?

3 A This is a letter from Terry White, who is an
4 accountant for Staker Paving, confirming the balance owed on
5 the real estate contract.

6 Q Dated?

7 A Dated February 14, 1985.

8 Q And it is written to you; is that correct?

9 A That is correct.

10 Q Had you ever discussed this with Mr. White before?

11 A Yes, I had.

12 Q Do you know what Mr. White's position at Staker
13 Paving was at this time?

14 A He was an accountant. He was one of the people
15 that I had talked with on a somewhat regular basis, along
16 with others concerning our respective business dealings, the
17 cash that had to pass back and forth.

18 Q Do you know what authority he had as a cost-
19 accountant with Staker Paving?

20 A I don't know, although I know that whenever, I
21 think during this period of time, he was the one that I
22 dealt with specifically on matters relating to our
23 agreement.

24 Q He, at least had access to the accounting records
25 that would give you the balance due and owing; is that

1 correct?

2 A That is correct.

3 Q Did he have any other authority, to your
4 knowledge, beyond that?

5 A As I remember in talking to Stu on who I should
6 talk to on accounting matters, that this is who I was
7 referred to. So I assume that he had some authority.

8 Q By "accounting matters", what do you mean?

9 A I believe as far as the payments that needed to be
10 made on their contract to us and on our payments to them,
11 I'm sure at this point that Staker was owed money by the
12 Jeremy Limited and that Terry White probably called me
13 regularly to find out what was going to happen with their
14 funds.

15 Q Is it your understanding that Terry White was the
16 accountant that handled collections and payments?

17 A I assume that was his role because that was the
18 manner in which I dealt with him.

19 Q Can you tell me in general what does a cost
20 accountant typically do for a company?]

21 A I would imagine, in my definition of a cost
22 accountant, I don't know if it is theirs, but mine would be
23 that he would be doing job cost accounting for their
24 projects.

25 Q Do you remember the circumstances surrounding the

1 sending of this letter?

2 A Yes. We had negotiated with Foothill Thrift and
3 Loan to sell them the contracts that were still owned by
4 West Jordan Properties. We had several loans with Foothill
5 Thrift that were due. I met with Larry Grant and discussed
6 what we could do, what our options were and it was agreed
7 upon that we would in fact sell them the contract that West
8 Jordan Properties owned at that time. They were not placed
9 anywhere else, they were free and clear. There was
10 substantial equity in the contracts. He gave me a list of
11 things that he would need in order for that to take place
12 and one of them was a letter of confirmation from each of
13 the contract holders indicating the contract balance. So I
14 called Terry White and told him what I needed and why I
15 needed it and he sent me the letter.

16 Q It's your recollection that you told Terry White
17 that you needed this letter in order to make an assignment
18 to Foothill Thrift?

19 A That's correct. Prior to this time we had never
20 really sent letters back and forth just to confirm a balance
21 that was owed. Letters that had passed hands before always
22 were to recognize payments or trade or whatever, but this
23 was not a payment date. The whole purpose of this letter
24 was to give to the bank—and I told that to Terry at the
25 time.

1 Q Did you confirm that in a letter to Staker Paving,
2 that the purpose for obtaining this letter was to make an
3 assignment to Foothill Thrift?

4 A I don't believe I did because we were in a hurry
5 to do it and I think all I did was call him on the phone
6 and tell him what I needed and he said, "Fine, I will send
7 it to you." I don't think there was any concern at that
8 time on what the balance was owed, and there was certainly
9 no obligation to do anything different than that.

10 Q At the time this balance was owed on the note, did
11 Bagley or any of his entities owe Staker Paving money?

12 A By virtue of the invoice you have showed me, they
13 obviously did and I'm sure there was money outstanding on
14 the Jeremy Ranch at the time because one of the big problems
15 that we had at this point in time was trying to get funds
16 out of our constructions lenders on the Jeremy. So I'm
17 sure there was funds owed Staker and several other
18 contractors.

19 Q Did you consult anyone other than Terry White at
20 Staker Paving, to your recollection, regarding the
21 assignment of this real estate contract to Foothill Thrift?

22 A I don't believe I did.

23 Q You didn't discuss it with Stu Staker?

24 A I don't recall that I did. I recall discussing it
25 with Terry White but I don't recall talking about it with

1 anyone else.

2 Q Why only Terry White?

3 A As far as I was concerned the contract was ours
4 and it was an asset, it was a receivable that we could do
5 anything that we wanted to with. I didn't think we needed
6 to get approval from Staker to assign it.

7 Q Even though it was more than off-set by monies
8 owed by Bagley to Staker?

9 A I don't think that I put those two together and I
10 don't think that we ever put those two together until such
11 time as we ever sat down and discussed how we were going to
12 handle payments. And I don't think at this point in time
13 that I had any doubt or anyone else had any doubt that
14 there would be a way to pay Staker whatever was owed them,
15 as well as all of the other contractors that were owed
16 money. So, I don't think that I would have looked at it as
17 an off-setting balance. That was not the way that we
18 normally did business. Our agreements with Staker were not
19 such that we regularly kept track of who owed who what at
20 any point in time to off-set. It was more done after the
21 fact or before the fact by mutual agreement and at this
22 point in time I think that I would have recognized them as
23 two separate complete things.

24 (Marked for Deposition Exhibit 17 - Construction
25 Management, Inc. Letter, Dated April 23, 1981.)

1 about an assignment?

2 A Yes, because I called him specifically. This was
3 an unusual request on my part to ask for a letter from him
4 on a date, not an audit, not anything, asking for
5 confirmation of the balance. That was not the way that we
6 had done things before. If I was just interested in
7 confirming what the balance was to make sure our records
8 agreed, I would have called him up and said, "What is your
9 balance?"

10 He would have told me, and I would have said, "Great,
11 that is what I have got, too." And that would have been the
12 end of it.

13 Q Getting to your discussion of the assignment, let
14 me show you what has been marked in a prior deposition as
15 Exhibit 4. Does that appear to be the assignment of the
16 contract of Staker Paving to Foothill Thrift?

17 A I believe so, yes.

18 Q Is that the assignment that you negotiated?

19 A I believe so.

20 Q And who did you have your negotiations with?

21 A Primarily Larry Grant.

22 Q Any others at Foothill Thrift?

23 A I think he was the primary one that I dealt with.

24 Q Was there anyone else that you dealt with?

25 A There was another girl there named Donna Moore

1 that handled our loans and I could have talked to her about
2 some of the items. She was kind of an assistant of Larry's.

3 Q When did discussions begin regarding the
4 possibility of obtaining a loan through the assignment of
5 this contract?

6 A Well, we had several loans with Foothill Thrift
7 that were delinquent and Larry called me and said "Come in
8 and let's talk about it" and so I did.

9 Q Do you recall when that was?

10 A I don't. It was obviously towards the end of the
11 year, either in January or February of 1985 or December of
12 1984, somewhere in there.

13 Q Did anyone else go with you?

14 A Very possibly Tom Bagley was with me.

15 Q When you went into talk to Mr. Grant the first
16 time?

17 A And we discussed basically what our options were,
18 what could be done to bring the loans current. We told him
19 that we didn't really have anything that was, in the way of
20 a free and clear property and that taking money out of the
21 Jeremy at that point in time seemed not to be a possibility
22 because of the events that we have already discussed. We
23 told him that we had these contracts that West Jordan
24 Properties owned, and there was substantial equity in them,
25 would he be interested in taking them as additional

1 collateral and rolling the loans or what he would like to
2 do, take them as an assignment or what. And at that point
3 in time I think he talked to his board and came back and
4 said, "Well, we will buy them at a discounted amount", and I
5 think we had several discussions on what that should be. We
6 finally agreed upon an amount and effected the assignments.
7 They bought the contracts and applied the proceeds against
8 the balances owed on our loans, which eventually all became
9 delinquent and weren't collected on anyway.

10 Q So you were not obtaining new money on the
11 assignments being made?

12 A No, it was to pay off principle and interest on
13 outstanding loans.

14 Q And Foothill Thrift actually purchased the
15 contract rather than receive it as a collateral?

16 A That's correct.

17 Q Over what period of time did these discussions
18 take place?

19 A Well, I don't recall exactly when the loans were
20 due. I would imagine that it was probably during the months
21 of January and February because this was dated the 12th day
22 of March and I remember it being something that wasn't done
23 very quickly.

24 Q Where did the discussions take place?

25 A I'm sure they were at Foothill Thrift's offices.

1 Q And who was present? Was Tom Bagley always
2 present with you during these discussions?

3 A I don't know if he was all of the time, but I'm
4 sure he was some of the time.

5 Q How often did you meet with Mr. Grant during the
6 course of this?

7 A I'm sure that there may be four or five different
8 meetings that were held.

9 Q Did you ever involve any of the debtors on the
10 contracts you were assigning in your discussions with Mr.
11 Grant?

12 A There was one, a guy named Dale Jones. When I
13 told him, I had to get from him also a confirmation and he
14 gave it to me, but he was concerned as to what Foothill,
15 whether Foothill would work with him as we had in the past
16 on releasing property because we had agreed prior with Mr.
17 Jones to release property sometimes when he hadn't paid for
18 it in full because we had a very good relationship with him
19 and he wanted to find out what Foothill's position was going
20 to be. So prior to the closing of the loan I think he met
21 with Foothill.

22 Q Approximately how many contracts did you assign?

23 A There was five or six.

24 Q Of those five or six contracts, were any of the
25 buyers of the real estate taking off-sets or making trade

1 payments like Staker Paving was?

2 A We had a contract with Harper Excavation and I
3 think they had in the past made trade payments. That was
4 one of the contracts that they purchased.

5 Q Any others?

6 A No, I don't think any of the others were with
7 contractors, they were with individuals.

8 Q Was Harper at any time involved with the
9 negotiations or negotiations with Foothill Thrift regarding
10 the assignment of their contract?

11 A No. They gave a letter just like this one
12 confirming their balance.

13 Q And that was it?

14 A Yes. As I recall, as part of the discussion with
15 Mr. Grant, he did not want me to prepare a letter and send
16 it asking for confirmation. He wanted a letter signed on
17 their letterhead stating what the balance was. So that he
18 could be assured that it really came from them, I guess, but
19 that was what he was requesting.

20 Q In your discussion with Mr. Grant regarding the
21 Staker Paving contract, did you disclose to him that Staker
22 Paving had at times in the past made trade payments?

23 A I'm sure we did because as I went through the
24 individual ledger sheets on each one of them, I'm sure that
25 he would have seen that there were trades.

1 O The exhibit that we marked as 8, is it your
2 recollection that you provided Mr. Grant a copy of that
3 ledger sheet?

4 A If it wasn't this one, it was one like it.

5 Q He then was aware of the trade payments made over
6 the course of this loan as outlined by that ledger sheet?

7 A I would imagine so and I would imagine that as we
8 talked about those that I would have told him that that was
9 something we did when it was mutually agreed, when it was
10 what we wanted to do. The trade, in essence, was, I mean we
11 would give them a check and they would give us a check, so
12 as far as he was concerned value was being given.

13 Q There were actual checks being cut?

14 A We didn't cut them, no, but that was the way we
15 actually accounted for them. We actually ran it through our
16 books that way.

17 Q As a check being paid?

18 A So when we talk about the off-set, a trade, we did
19 have trades actually during the course where we did trade
20 checks, not with Staker but with other people.

21 Q Was there ever a time when you cut Staker a check
22 and they cut you a check with regards to payments on the
23 real estate contract?

24 A Not on this, no. We had a good enough
25 relationship with Staker that none of us felt like we needed

1 to do that.

2 Q But on your books it would have been run through--

3 A As a check.

4 Q And you would have identified it as a check?

5 A Yes, we would. It would be processed in our books
6 as if a cash payment had been made and a cash payment had
7 been received.

8 Q Once you identified to Mr. Grant that Staker
9 Paving had been taking trade payments, did you identify for
10 him any balance due Staker Paving by Dr. Bagley or any of
11 his entities?

12 A I don't know if it was discussed. As I mentioned
13 at this point in time we had outstanding invoices to several
14 contractors.

15 Q Did Mr. Grant ever ask you if any monies were owed
16 to Staker Paving that may potentially be off-set by the
17 contract?

18 A I'm sure we had discussions on whether or not the
19 contracts were free and clear and whether there were any
20 obligations to hinder the title or the value of the
21 contracts and if he would have asked me that I would have
22 told him that there was not.

23 Q There was not what?

24 A There was not any obligation to off-set and that
25 the balance owed was actually owed. I don't think I would

1 have related any payments that we owed Staker on contracts
2 or on work that was being done with their contract to us
3 because the amount of work that Staker did far exceeded the
4 balances that we are talking about on this contract. It was
5 very normal for them to do several hundreds of thousands of
6 dollars worth of work in a year and most of that was paid
7 for in cash. So it wasn't like they would do \$30,000 or
8 \$40,000 a year and we would have \$50,000 on the contract.
9 The amount of money that was actually paid to Staker every
10 year was much greater than ever on the contract. The
11 contract itself was more a means to take care of smaller
12 items that were done.

13 Q So you would have presumed at the time, or perhaps
14 you did assume at the time that you made this assignment of
15 the contract that Dr. Bagley and some of his entities could
16 very well have owed Staker Paving well in excess of this
17 amount?

18 A It is very possible from the Jeremy Ranch alone
19 that there was \$200,000 or \$300,000 outstanding but again I
20 did not relate the two together at all.

21 Q At the time that you negotiated this assignment,
22 how could you have known that Dr. Bagley's engineer had not
23 negotiated in getting a bid on work from Staker that work
24 would be credited towards this real estate contract?

25 A Ask me that again.

1 Q I will ask you, did you check with the engineer to
2 see whether or not he had already allotted amounts under
3 this contract for work that Staker was doing?

4 A Any time that Mike Alldredge negotiated a trade it
5 was normally before work was done and I would have known
6 about it.

7 Q You would have known about the trade before the
8 work was actually done or the trade was actually made?

9 A I would have known that work was being done on
10 trade.

11 Q Every time?

12 A Pretty normally, that was the way we did that.
13 There were times that we did it after, but in most cases we
14 negotiated the trade payments before the work was actually
15 done.

16 Q Did you indicate to Mr. Grant you very well could
17 have owed Staker Paving monies at the time that you assigned
18 the real estate contract?

19 A I don't recall specifically saying that, no. As I
20 mentioned, the main thing we were concerned about was
21 whether or not the money was owed by Staker to West Jordan
22 Properties and whether or not it had been assigned anywhere
23 or there was any obligation that would hinder performance.
24 And, as far as I was concerned, there was none.

25 Q And your opinion alone was good enough for

1 Foothill Thrift, your assurance alone?

2 A They got a title report. I don't think, as I
3 mentioned, as far as I was concerned and I think as far as
4 everyone in our office was concerned, the contract and any
5 payments that were owed Staker were two complete different
6 things. We had a contract receivable and we had contracts
7 payable and we had amounts payable on work that was done,
8 but we didn't, on our books or at any time mentally off-set
9 them or anything of the sort.

10 Q But in the course of your dealing with Staker
11 Paving from 1979 through 1984 you had accepted trade
12 payments on this real estate contract; is that correct?

13 A We had accepted trade payments of \$250,000 but at
14 the same time we had probably made cash payments in excess
15 of a million and a half.

16 Q But there was an established relationship
17 between--

18 A There was, on occasion, when we both felt that it
19 was mutually beneficial, we traded.

20 Q You didn't answer my question. There was, at the
21 time of the assignment, an established relationship between
22 work being done by Staker and the real estate contract; is
23 that correct?

24 A That's correct.

25 Q Because through the course of the payments coming

1 due in this real estate contract, trade payments had been
2 accepted?

3 A Again I want to emphasize--

4 Q Answer my question. Is that correct?

5 A Yes, there had been an established pattern where
6 we had done that but it was only when it was agreed upon by
7 both parties. There were times that I desperately wanted to
8 trade and Staker refused and that created a great deal of
9 problems for us because we had to fight like mad in order to
10 make payments to them because they would not trade. So it
11 was never an under-standing that we had to trade or that we
12 were going to trade unless we agreed upon it beforehand and
13 we both agreed that that was what we were going to do. It
14 was not an established form of "You are doing work and we
15 owe you money and you owe us money." It wasn't that type of
16 relationship. When we knew we had this balance out there,
17 it was a little part of our business and it was a little
18 part of their business and when it seemed right to off-set
19 we off-set. But it wasn't something that we had an
20 obligation to do or they had an obligation to do.

21 Q Was there ever a time during the course of
22 accepting trade payments under this contract where Staker
23 Paving requested a trade payment and Dr. Bagley or his
24 entities refused and specifically requested that they make
25 a cash payment?

1 A Well, as we talked previously, I mentioned the
2 time that I went out and met with Val and Bill Fillmore,
3 they talked about holding it off and trading and we said no,
4 we needed the cash and they paid it. And there were
5 similar times on the other side where we owed money to
6 Staker and I was requesting a trade and they refused and we
7 had to pay them. So it was only when it was mutually agreed
8 on both sides that it was beneficial that we actually did
9 trade.

10 Q And did you explain that whole process and
11 procedure to Larry Grant?

12 A I very well could have. I don't recall if I did
13 or not. I'm sure I told him that there was no obligation on
14 any of these contracts other than they were receivables that
15 we had and they hadn't been assigned to anyone and they
16 were free and clear as far as I was concerned.

17 Q And he had required nothing more than your opinion
18 in that regard?

19 A He got a letter from each one of the contract
20 holders on their letterhead stating what the outstanding
21 balance was that was owed to us.

22 Q And that was all that he requested, that was all
23 the assurance he needed?

24 A I don't know--

25 Q Did he request that you do anything more to assure

1 attempted very hard to do.

2 Q But you were unsuccessful?

3 A That's correct.

4 Q Subsequent to the assignment of the contracts,
5 have you had any other discussions with Foothill Thrift
6 regarding those assignments since March 12th, 1985?

7 A I'm sure I have talked to them about it, but I
8 don't recall specifically about what. I think Larry
9 indicated to me the problem that he was having with Staker
10 collecting.

11 Q What did he tell you?

12 A That they were claiming an off-set.

13 Q What did you say about their claim?

14 A He probably asked me if there was a written
15 contract that we had to off-set and I'm sure I would have
16 told him no.

17 Q Do you recall anything else in that discussion
18 that you would have had with him in Stakers claiming an
19 off-set?

20 A I don't believe so.

21 Q Did he express any surprise at Stakers' claiming
22 an off-set?

23 A I don't really recall the conversation that
24 clearly.

25 Q Did he express any anger towards you for not

1 Q On Exhibit 8, is it fair to state that the trade
2 payments related to work that may have been done by or for
3 other than the seller of that property which was West
4 Jordan Properties?

5 A I think they all were.

6 Q So the trade payments could have arisen from work
7 performed on behalf of any number of Bagley's companies?

8 A That's correct.

9 Q Were all of the Bagley companies essentially
10 treated as one when it came to trade payments and the
11 performance of the uniform real estate contract?

12 A Well, the outside public viewed us as one entity.
13 Internally separate records were kept for each entity, each
14 entity filed its own tax return and had its own accounting
15 systems.

16 Q Internally, let's talk about a trade payment on
17 the uniform real estate contract with West Jordan
18 Properties and let's assume that the work was done for
19 Bagley Corporation. Would there be a internal accounting
20 adjustment between West Jordan Properties and Bagley
21 reflecting that West Jordan was now due money from Bagley?

22 A Yes. We annually kept track of loans made to and
23 from entities and interest was charged and payments were
24 occasionally paid off.

25 Q Exhibit 12 is the invoice that appeared December

1 11th, 1984, would that have been the only outstanding debt
2 due to Staker by Bagley's companies?

3 A At that point in time?

4 Q Yes.

5 A I don't know that. My opinion would be that I
6 doubt it. I would imagine that they were owed money by the
7 Jeremy Limited at that time too, but I don't know that for
8 a fact.

9 Q Do you know if any payment was made by Jeremy
10 Limited or any other company to Staker Paving after December
11 11, 1984?

12 A I believe it was, I don't know that for sure. I
13 am guessing.

14 Q Would there have been any other trade payments on
15 any other properties?

16 A No.

17 Q The Industrial Park with the address of 9000
18 South 6000 West in West Jordan, is that the same or a
19 different piece of property than what is associated with the
20 uniform real estate contract of July, 1977?

21 A It is a different piece of property.

22 Q Are you aware of any work done on the property
23 that was the subject of the 1977 contract that was used as a
24 trade payment?

25 A You mean on the property that Staker purchased?

1 Q Yes.

2 A Staker took the property and used it as a gravel
3 pit and by agreement with Dr. Bagley, they were allowed to
4 do that.

5 Q So, Staker--

6 A So Staker, if there was any improvements done,
7 Staker improved it, we didn't.

8 Q And they would have been in possession of the
9 property and controlled the property using it for Staker's
10 business purposes?

11 A That's correct.

12 Q And so there was in essence no opportunity for
13 any work done on the 1977 contract property to be used to
14 trade payment on any other debt that was owed by Bagley's
15 companies?

16 A That's correct.

17 Q Are you familiar with the June 1984 road contract
18 that is referred to as the Road Contract in this lawsuit?

19 A No, I'm not.

20 Q Do you know what that is referring to?

21 A Well, I assume that it was a contract for the debt
22 that we are discussing.

23 Q And that was on the Industrial Park?

24 A I am assuming that.

25 Q And that is wholly unrelated to the property that

1 was sold in July of 1977?

2 A That's correct.

3 Q The loan from Tracy Mortgage Company that is
4 reflected in Exhibit 13 and I think you referred to it as
5 the loan for approximately a million and a half dollars, do
6 you know what I am talking about?

7 A Yes.

8 Q When was that loan negotiated?

9 A I don't recall exactly. It seems like it would
10 have been in 1983 or 1984, possibly 1983 or 1984.

11 MR. PROCTOR: Thank you, Mr. Sorensen.

12 MR. MARTIN: Mr. Sorensen, My name is Mel Martin,
13 and I represent Foothill Thrift and Loan. I would like to
14 ask you a couple of clarification questions first.

15 EXAMINATION

16 BY MR. MARTIN:

17 Q During your previous testimony I believe Mr.
18 Griffith asked you or made the statement and put it in the
19 context that Mr. Stu Staker with Staker Paving had an option
20 to take an off-set or trade payments or words to that
21 effect. Did his use of the term "Had an option for taking
22 an off-set", what would be your understanding of an option
23 to take an off-set?

24 A There was no option that one party could impose
25 upon the other. The option was that it could be discussed

1 because the trades were never agreed upon unless they were
2 agreed upon by both parties.

3 Q In other words, it would have been requested by
4 one side or the other?

5 A Right. It was an option, I guess, that it had
6 been done in the past and there was the possibility to
7 discuss it.

8 Q In your testimony you mentioned that where trade
9 payments were accepted for work performed on the Industrial
10 Park or other projects, you stated you never discriminated
11 between projects or there was no discrimination between
12 projects.

13 A That's correct.

14 Q What did you mean by that?

15 A Well, there were not projects where work could not
16 be traded, I guess is what I meant, that when we agreed to
17 trade it didn't matter whether the work was done on the
18 Canyon Racquet Club or up at the Jeremy Ranch or any of the
19 other Bagley projects. It could have been done anywhere.

20 Q Directing your attention to what has been marked
21 as Exhibit 16, I will refer to that as the White
22 confirmation letter concerning the amount of the debt on the
23 contract to be \$98,471.84, did that number agree with the
24 number that you had on your books at that time on that
25 contract?

1 A I believe I was actually about \$200 shorter than
2 that and I didn't know why, possibly an interest difference
3 but I was within \$218 of that balance. I think that was
4 what I talked about before, that I had adjusted our records
5 to agree with theirs.

6 Q You stated that when Mr. Alldredge, the engineer,
7 arranged for work to be performed by Staker in a trade
8 situation or for trade payments, that agreement was normally
9 made in advance.

10 A It was very often made in advance. It wasn't
11 always made in advance, there were times that we agreed
12 afterwards to trade but the normal procedure was that, here
13 is some work that needs to be done and Staker has agreed to
14 do it on trade. Should we go ahead and do it?

15 Q Those occasions when you requested of Staker
16 Paving to trade work and were denied that ability, was there
17 any argument or discussions that there was an obligation on
18 the part of either side to take trade payments?

19 A Not an argument, it was more a pleading by me
20 because at that point in time arranging for the cash to pay
21 them was difficult and I requested a trade and I can't
22 remember who I was working with at the time, it might have
23 been Arlo Anderson or this Ronne but they indicated that
24 they had their own cash flow problems and that they needed
25 the cash and they were not willing to trade at that point

1 in time. So I proceeded to arrange to pay them.

2 Q Do you recall approximately when that would have
3 been, or the time frame?

4 A It would have been in the 1982, 1983, 1984,
5 somewhere in there. I don't remember exactly.

6 Q Could it have been all three of those years?

7 A There was one specific instance and if I had to
8 guess I would have guessed that it would have been in 1983.

9 Q At one point in your testimony you mentioned that
10 you may have paid one and a half million dollars in a twelve
11 month period to Staker Paving. Do you have any recollection
12 of what you might have averaged in payments to them from
13 year to year?

14 A I don't believe we actually ever paid them a
15 million and a half in a year. I was referring to over the
16 life of this contract that we had at least paid them that
17 and that the amount of money that was paid in cash far
18 exceeded the amount that was ever traded and that was the
19 point I was trying to get across, that trades were done
20 primarily on the small things and things of larger scope
21 were paid in cash. That is the way we primarily did things.

22 Q If I understood your testimony correctly, neither
23 you or Mr. Alldredge would have ever unilaterally agreed to
24 an trade-off without either the approval or concurrence of
25 Mr. Bagley?

1 contractors wanting to trade it and we felt that the terms
2 that they were calling for in the trade were unfair and we
3 did pay cash because it was cheaper.

4 Q But there was never a time when Staker's terms
5 were unfair and they were not accepted?

6 A Not to my knowledge, but like I mentioned, we had
7 a very good working relationship with Staker and actually
8 got to the point where I think Mike Alldredge and Stu
9 Staker basically negotiated contracts without getting bids
10 from anyone else because they felt like they had such a good
11 relationship.

12 Q So there was never a reason to suppose for Staker
13 that if they wanted to take a trade off-set rather than
14 receive cash payments from Bagley would turn them down; is
15 that correct?

16 A I would guess they could assume that.

17 Q Could you foresee any reasons from knowing the
18 working relationship that you and Bagley had with Staker,
19 that you would ever turn down the opportunity to take a
20 trade other than pay in cash?

21 A Well, after we sold the contract, obviously we
22 couldn't.

23 Q But prior to the selling of the contract?

24 A Well, we owned the contract, if work had been done
25 and the terms were fair I think we would have traded with

1 Staker on just about any occasion.

2 Q And there was no reason to assume that the terms
3 would not have been fair with Staker?

4 A We had a good history with them.

5 MR. GRIFFITH: Mr. Marsh, is there anything that
6 you would want to have put on the record?

7 MR. MARSH: I have a couple of questions here.

8 EXAMINATION

9 BY MR. MARSH:

10 Q When you stated that you felt that Stakers could
11 assume that trades could be made, I assume that was only
12 after a request was made to trade.

13 A That's correct.

14 Q And approval was given by Dr. Bagley?

15 A That's correct.

16 Q And in fact there was one occasion where they
17 requested a trade and you refused and insisted on cash; is
18 that right?

19 A That's correct. It worked both ways. There was a
20 time that they requested a trade and we requested cash, and
21 in fact got cash, and there was a time that we requested a
22 trade and they requested cash and in fact got cash. The
23 only time we traded was when we said it was a good deal for
24 both of us and that was when we traded.

25 Q So when you refer to an assumption it was an

1 assumption that you would discuss it and agree upon it, both
2 parties?

3 A That's correct. It was something that we had done
4 in the past.

5 Q The contract that was assigned to Foothill is in
6 the name of what party, is signed by what entity?

7 A I'm sure it would be West Jordan Properties.

8 Q And that was a separate entity from Bagley and
9 Company?

10 A Yes.

11 Q And the Bagley Family Partnership?

12 A That's correct.

13 Q From G.H. Bagley, Inc.?

14 A Yes.

15 O From all of the other entities?

16 A From all of the other entities, it was an entity
17 in and of itself that had its own books and records and
18 filed its own tax returns.

19 Q You were asked a question about why the payment of
20 the balance due on the invoice which is Exhibit 12 was not
21 made and I think you indicated that funds weren't available
22 at the time. Were there other reasons why that invoice or
23 that obligation was not actually paid?

24 A Well, that was the primary reason. I know that we
25 went to Tracy Collins and tried very hard to get them to pay

1 because we felt like it would enhance their collateral.
2 Tracy Collins had the work inspected and went to the city
3 and tried to get the city to accept the work and the city
4 would not accept the work. So we were unable to get Tracy
5 to pay for it. We are still attempting to find out what
6 can be done and trying to get Tracy to eventually pay for
7 it. We haven't been successful in doing that.

8 Q So is it fair to say that there is a dispute over
9 whether or not the work was completed and properly done?

10 A There is a dispute but it is not one that I don't
11 think can't be worked out.

12 MR. MARTIN: I have a follow-up question, if I
13 might.

14 FURTHER EXAMINATION

15 BY MR. MARTIN:

16 Q In follow-up to Mr. Marsh's questions where there
17 were separate entities for whom the work was performed
18 rather than West Jordan properties that had title to the
19 property, were the bids given to and the contract with
20 those particular entities between them and Staker Paving,
21 did they ever reference the real estate contract dated 1977?

22 A Did the bid contracts?

23 Q Right.

24 A I don't know, I haven't, I didn't as a matter of
25 course, ever see those.

1 Q Work performed by Staker Paving for one of the
2 Bagley entities would have been paid for how, from whose
3 checking account or whose banking account?

4 A The funds were all maintained in a general banking
5 account and allocated by off-sets. So the check would have
6 looked the same but the accounting would have been different
7 depending upon the entity that it was being done by.

8 Q So it would have been paid by the entity for whom
9 the work was performed?

10 A That's correct according to the books and
11 records, if they did work for the Jeremy Ranch, the Jeremy
12 Ranch would, in essence, pay them for it and if a trade
13 occurred, then that trade would be off-set against balances
14 between balances owing between the Jeremy Ranch and West
15 Jordan Properties.

16 Q A final question, you previously testified that
17 when the assignment of the real property or real estate
18 contract was made to Foothill in 1985 that it was Bagley's
19 position, your position that the contract was in good
20 standing?

21 A That's correct.

22 Q Is it true that at that time, March or 1985, no
23 work either performed or being performed by Staker Paving
24 that would have been automatically entitled to a trade-off
25 against that contract?

1 A There had been no negotiation or no agreement to
2 trade any work on any outstanding balances. When we sold
3 the contract, we did it with the conscience that was clear
4 that we had a receivable that was an asset that we were
5 selling to try to reduce loan balances.

6 MR. MARTIN: Thank you, that is all.

7 MR. GRIFFITH: We will close the record.

8 (Whereupon the Deposition was concluded.)

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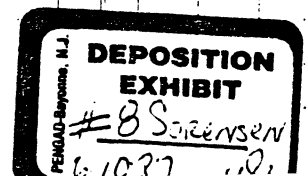
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Due: Annually on 7/1

DAYS	DESCRIPTION	DATE	PAYMENT Amount	INTEREST	PRINCIPAL	BALANCE DUE
	Purchase Price	7/1/77				435609.00
126	CASH PAYMENT	11/3/77	87500.00	11278.10	76221.90	359387.10
522	TRADE INV. #12616	4/9/79	22000.00	22000.00	-0-	359387.10
103	TRADE INV. #13213	7/21/79	56623.00	24154.17	32468.83	326918.27
24	TRADE INV. #13508	8/14/79	33253.76	16122.00	31641.56	295276.71
334	TRADE - Concrete	7/14/80	18732.54	18732.54	-0-	295276.71
7	TRADE - Asphalt	7/21/80	21812.32	19570.50	19855.27	275421.44
31	TRADE - Concrete	8/21/80	3130.90	3130.90	-0-	275421.44
65	TRADE INV. #14933	10/25/80	68286.17	5119.88	63166.29	212255.15
614	CASH PAYMENT	7/1/82	54572.06	23779.04	30793.02	181462.13
398	TRADE - Foothills	8/3/83	19038.11	14840.12	4197.99	177264.14
109	TRADE - Foothills	11/20/83	3721.18	3721.18	-0-	177264.14
-	TRADE - Jeremy	11/20/83	12994.06	249.05	12745.01	164519.13
88	CASH PAYMENT	2/16/84	18818.71	2974.87	15843.84	148675.29
136	CASH PAYMENT	7/1/84	54577.06	4154.76	50422.30	98252.99
	ADJUSTMENT (TO AGREE WITH STAKERS BALANCE)				<21885>	98471.84
	CASH Payments TOTAL		* 215467.83			
	TRADE Payments TOTAL		* 256774.23			





PAVING AND
CONSTRUCTION CO. INC.
1000 West
Salt Lake City, Utah 84020

1-5310

July 31, 1980

Bagley & Company
P. O. Box 17230
Salt Lake City, Utah 84117

Attn: Richard Sorensen

Gentlemen:

On July 14, 1980 King Con, Inc. billed you \$18,732.54 for concrete work performed at the Racquet Club.

King Con, Inc. is a sister company of Staker Paving & Construction Company and we would like to ask you to apply the total amount against the real estate contract Staker Paving has with you.

I will assume this is acceptable to you unless I hear differently from you.

Sincerely,

A handwritten signature in cursive script, appearing to read "W. S. Ronne".

W. S. Ronne
Vice President

WSR/pw

DEPOSITION
EXHIBIT

10-10-80, N.J.

#11 Sorensen



September 8, 1980

South 500 West
Salt Lake City, Utah 84020

Phone
571-5810

Bagley and Company
P. O. Box 17230
Salt Lake City, Utah 84117

Attn: Richard Sorenson

Gentlemen:

On July 21, 1980 we billed you \$21,812.32 for asphalt work on your parking lot at 7350 South Wasatch Blvd.

We would like to apply the total amount of this invoice against the real estate contract Staker Paving has with you.

I will assume this is acceptable to you unless I hear differently.

Sincerely,

W. S. Ronne
Vice President

WSR/pw





September 12, 1980

PAVING AND
CONSTRUCTION CO. INC.
10th 500 West
Salt Lake City 84020

5810

Bagley and Company
P. O. Box 17230
Salt Lake City, Utah 84117

Attn: Richard Sorensen

Gentlemen:

On August 21, 1980 King Con, Inc. billed you \$313.09 on invoice number 120457 for concrete work performed at the Racquet Club.

King Con, Inc. is a sister company of Staker Paving and Construction Company and we would like to ask you to apply the total amount against the real estate contract Staker Paving has with you.

I will assume this is acceptable to you unless I hear differently.

Sincerely,

A handwritten signature in dark ink, appearing to read "W. S. Ronne". The signature is fluid and cursive, with a long horizontal stroke at the end.

W. S. Ronne
Vice President

WSR/pw



1 South 500 West
Dr. Utah 84020

Phone
571-5810

November 21, 1980

Bagley & Company
P. O. Box 17230
Salt Lake City, UT 84117

Attn.: Richard Sorenson

Gentlemen:

We have performed work for you on cart pads at the Jeremy Ranch and have submitted to you our invoice #14933, dated October 25, 1980 in the amount of \$162,681.00.

We would like to offset against that invoice the amount of \$68,286.17 that remains to be applied against our real estate contract with you in order to meet our agreement of paying two annual payments on the contract this year.

Enclosed is a schedule with the payments we have applied to the contract and the interest calculation we have made.

We trust you agree with these computations and with the amount of \$212,764.11 remaining on the contract.

If you should have any questions, please feel free to contact me.

Sincerely,

W. S. Ronne
Vice President

WSR:nn

encl.